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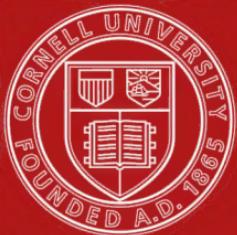
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A manual of elementary practice :being p



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A MANUAL  
OF  
ELEMENTARY PRACTICE

PRACTICAL SUGGESTIONS ON THE BEGINNINGS OF  
LEGAL PRACTICE

BY  
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And Lecturer at the Yale Law School

*"Soliciter sapit, qui alieno periculo sapit"*

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THE AUTHOR DEDICATES THIS BOOK  
TO THE  
BAR OF LYCOMING COUNTY

(THE XXIXTH JUDICIAL DISTRICT OF PENNSYLVANIA)

AMONG WHOSE MEMBERS HE HAS EVER FOUND THE ABILITY, COURTESY  
AND HIGH PROFESSIONAL HONOR SO CONDUCIVE TO THE AGREE-  
ABLE PRACTICE OF THE PROFESSION OF THE LAW



## PREFACE

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The young lawyer, upon his admission to the bar, may be equipped with a knowledge of the theory and principles of the law, but is usually ignorant of the practical side of his profession. The means whereby he may secure a clientage, the choice of a location, the selection of his library, the care and system of his office, and the opportunities for an association with other lawyers, are uppermost in his mind, and under active consideration. The elements of professional success, the course of his studies during his novitiate, the ways and means by which he can best acquire a knowledge of practice, the manner of doing professional work, as well as an acquaintance with its many departments, are all subjects inviting his early and earnest attention. He will find many valuable works on advocacy, procedure and the preparation and trial of causes, but little, and nothing in a connected form, relating to many other matters of equal value in his profession and, perhaps, at this stage of his practice, of even greater benefit to him. These subjects, as well as the others, the author has attempted to discuss in this manual. Those already named, together with some consideration of legal ethics and professional compensation, practically treated, hints to the beginner aiding his

success, a discussion of the legal rights, duties, privileges and responsibilities of the lawyer, and a somewhat extended treatment of the various departments of the office work of the attorney, are included in the first and second parts of this work. The third division has to do with the preparation of causes and procedure, and the last part with the trial of cases. These have not been given as much elaboration as in other and more complete works on those subjects; the object being to furnish the advocate, and particularly the inexperienced, with some practical suggestions applicable to the litigation in which the lawyer may be engaged.

The favor accorded the author's course of lectures at the Yale Law School on the Beginnings of Practice, during the past six years, and some demand for the short synopsis furnished his classes, have emboldened him to offer this work to the profession, in the hope that it may meet with the approval of the experienced and prove helpful to the youthful practitioner.

C. LA RUE MUNSON.

*Williamsport, Pennsylvania,  
February, 1897.*

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# ELEMENTARY PRACTICE

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## PART I. OF THE LAWYER, GENERALLY

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### CHAPTER I.

#### THE ELEMENTS OF SUCCESS.

- § 1. **The dignity of the profession.**
- 2. Integrity.
- 3. Chief Justice Sharswood's insistence for professional integrity.
- 4. Industry.
- .5. The secret of professional industry lies in conserving time.
- 6. Energy.
- 7. Promptness.
- 8. The modern lawyer must work expeditiously.
- 9. Perseverance and patience.
- 10. Despise not the day of small things.
- 11. Professional success is secured slowly.
- 12. The assurance of success.

§ 1. **The dignity of the profession.**—That the lawyer occupies one of the most important positions in society is a truism admitted without denial. Commencing with the advice and direction he gives to those who act as guardians of infants, throughout the life-time of almost every person, as well as in the settlement of their estates after death, the lawyer

is called upon to direct and, in no small degree, to manage the affairs of men in all their relations, domestic, personal and commercial. His duties are not confined to those relating to the preparation and trial of causes, but extend to the associations and connections men have with one another in all the varied affairs of life. For these reasons it is a noble profession, and one into which its members should enter soberly, advisedly, and with due respect to the dignity becoming the position of those in whom great confidence is necessarily reposed, and from whom much is to be expected.

**§ 2. Integrity.**—The lawyer's relations to his fellow-men are, therefore, so much based upon the confidence placed in him that the first element needed to secure success in his profession is absolute and unqualified integrity. This quality is the *sine qua non* in the attainment of that success. He may possess every other requisite, but without that one he is a failure. Lacking it he may acquire a temporary position in the profession, but a permanent place among its leaders can not be his, while, sooner or later, he must be relegated to its lower planes. Integrity covers so much of what is required of the lawyer, honesty, truthfulness, candor, and the evincement of the highest honor, that the mere statement of the proposition is a complete argument for its absolute necessity. While, from ignorance or from thoughtlessness, there are those who impugn to the profession, as a whole, a reputation antagonistic to this quality, it will be admitted by all fair-minded men that the members of the legal profession possess the attribute of integrity in as high a degree, and among as many

of its members, as is found in any other walk in life. None are better judges of this than the lawyers themselves. Their intercourse with their brethren of the bar gives them opportunities to test this quality more frequently, and in its highest and best expressions, than could be had by any others, even by their clients. It is believed the voice of the profession would answer in the affirmative the proposition that the promises and undertakings of their brethren are faithfully kept by such a majority of their number that the others count for but little; the few who do not possess their entire confidence being those who are soon cast out of the profession, or are left so far in the rear as to be unworthy, even publicly, the name of lawyers.

The very nature of the profession holds its members to the strictest integrity. No one more than the lawyer himself realizes the imperative necessity for an universal obedience to this rule of conduct. A client lost through want of the highest honor means more than the loss of so much of the lawyer's future business; it assures the certainty that his reputation is likely to be impaired with the community at large; while a lessening of the respect his brethren of the bar hold toward him is certain to lead to professional disgrace. While it is true, as it is of every other profession, that some of its members are without the possession of the highest honor—and it is the one untrustworthy lawyer who smirches the fair reputation of the whole profession, more so than in any other walk in life—it remains an undeniable fact that the successful lawyer is, necessarily, one who is honored with the enduring fame of the highest integrity, for the self-evident reason that the

want of that essential quality must have prevented the accomplishment of his success, and that its loss now would cast him from his high station. Of every great leader of the bar Shakespeare's encomium is well deserved:

“First, his integrity  
Stands without blemish.”

**§ 3. Chief Justice Sharswood's insistence for professional integrity.**—The late Chief Justice Sharswood, by nature and education so well fitted to treat that subject, thus sums up the lawyer's necessity for integrity: “There is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity; in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and man-traps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction. It is like the spear of the guardian angel of Paradise:

“No falsehood can endure  
Touch of celestial temper, but returns  
Of force to its own likeness.”<sup>1</sup>

<sup>1</sup> Sharswood's Legal Ethics, 55.

**§ 4. Industry.**—One of the stern commands to professional success is unceasing labor. No one of the many pursuits of life leads its members over a more rugged path than that of the profession of law. A hard student ever, an indefatigable worker always, must be the successful lawyer. The student can not master the principles of the law without burning the midnight oil; the beginner at the bar can not win clients unless they are assured that he possesses the power and ability to work; the active practitioner holds his business only through constant and unwearyed attention to its demands; and the leader of the bar maintains his prestige only by the continuation of the assiduous toil which has had so great a share in placing him in the foremost rank of his profession. Indeed, the higher the position the lawyer obtains the more difficult it is for him to hold it without the exercise of his highest talents, one of the most valuable being the capability and desire for unceasing labor.

There is ever an *ultima thule* in the profession of the law, because the lawyer has never yet been found, and never will be seen, who has mastered or can know all the law. Perfection may come in the management of some classes of business, in the pursuit of some of the trades, and, possibly, in the practice of some of the professions—so far as any perfection is vouchsafed to man—but there is and can be no supreme excellence in the knowledge or practice of the law. The amount of work which a great leader at the bar can, and, of necessity, does perform may seem to the beginner to be beyond anything he may ever be able to reach, but he will find that his early devotion to his professional labors,

meager though they may seem to him to be, and barren of present results, are the stepping stones to his ability to secure still greater powers of endurance, the future command of a valuable and lasting clientage, and the attainment of his highest aims, professional success and its many rewards.

**§ 5. The secret of professional industry lies in conserving time.**—The secret of the successful lawyer's industry is to be found in the fact that he does something during every moment of his professional hours. Let the beginner make it an inflexible rule that he will never permit an hour to be wasted in his office, so long as his time is within his control, and he will have mastered one of the chief elements of professional success. If he have clients he should work at their business until it is completed; this will be the means of holding those clients, and, through their recommendation, of securing others. If he is without clients, or their business has been completed, let him turn to his books and devote himself to his legal studies, acquiring a knowledge for which he will soon find need. Such a lawyer has never yet failed to win a clientage; it may come more slowly than to others, but it will be permanent and worthy the name. Look around the profession and note, without exception, that the lawyers with many clients are ceaseless workers; observe, equally, that the drones are without business. If mottoes were customary adornments of a lawyer's office he could not frame a better one than "*Labor omnia vincit.*" Trite it may be, but true without exception.

**§ 6. Energy.**—United with industry, indeed, but a higher step in the same direction, is energy. It has

been well defined to be a vigorous operation; words describing in precise language the manner in which a lawyer should perform his professional duties. He may be the very incarnation of integrity, he may be as industrious as the proverbial ant, but to crown both these good qualities he needs to put his whole heart into his work. It is a quality which wins the admiration of his clients, particularly those of the commercial class—and in these days of enterprise none are of more value to the lawyer—assures him of their legal business, and, what is equally valuable, their recommendation of his good qualities to others. He needs this quality of energy at all times and under all circumstances. Whether in his office or in court, he should do the work that is set before him with a vigor born of a desire to successfully accomplish his client's work, or to win his case; while, in the latter, if he does not bring it to a successful conclusion, he can rest assured that it is not from want of his own efforts. The lawyer who throws himself into the trial of a case with energy and vigor, and shows that it is having his best efforts, is sure to win the sympathy of the court and jury. Nothing dulls a good case so much as a half-hearted advocate who seems to lack interest in his cause, and thereby raises the suspicion that he, himself, is not thoroughly imbued with its justice, and with its right to win. If, on the contrary, the trial lawyer evinces his own belief in his client's positions, he may be sure of attentive listeners, and those who are attentive are already half won to grant him the victory. Energy is contagious, and may win by infusing into others some of

the enthusiasm which prevails with him who manifests that quality

**§ 7. Promptness.**—So closely allied with industry and energy is the quality of promptness that the latter is but a corollary to the former. We live in so rapid an age—in the days of electricity, the limited express, the stenographer, the telegraph and the telephone, not in the period of the stage-coach and of the slow mail wagon—that the legal profession must keep abreast of the times, or lose its prestige and influence. In earlier years the lawyer's practice greatly differed from that of the present; then he was chiefly engaged in the preparation and trial of causes, many of them slow ejection cases, in the settlement of estates, and in advising the larger land proprietors; following his profession in a quiet, easy-going manner, doing his client's business in his own way, and taking for it his own good time. That class of lawyers is not yet extinct, and may still be found in some parts of the country. We all know such men, famed lawyers too, although living more upon laurels won in the past than in seeking to add fresh victories growing out of the changed relations of the profession. We see such an one engaged, let us say, in the trial of an ejection case, and consuming time without regard to its value. He rises to his feet to answer objections to a proposed line of examination of a witness; he rises more than slowly, he twirls his eye-glasses for a moment or two, he slowly ejaculates, “May it please the court,” he pauses another moment, then, with almost painful slowness, he states his reasons for supporting his offer of evidence, interrupted by long pauses, and by an exasperating

delay in finding and citing his authorities. When he has finished, it is seen that he has taken up more time in preliminaries and pauses, absolutely wasted, than he has in saying what he had to say.

**§ 8. The modern lawyer must work expeditiously.**

—The one we have just described is not the lawyer of the day or of the future. The members of the bar who will succeed now and hereafter in the practice of the law are those who join their legal talents and moral qualities to a diligent dispatch of their professional duties; conducting their business on business principles, economizing time, and doing their work expeditiously. To the beginner, this quality of promptness is of the highest value. As has been said, he will find his best clients among the business men of the community. Such a client, in these days of activity and enterprise, expects his lawyer to do his work with the same promptitude and diligence he finds in the business world. If the young lawyer desires to win and keep legal business, he must do his work expeditiously and in a business method. If, for example, a client ask you to draw a contract, remember that he wants it to-day, or, very probably, yesterday, not to-morrow. See to it then that he has it at the earliest possible moment. That client, you may expect, will say to others: "Try Mr. A when you want your work done promptly; he is much more satisfactory than Mr. B, who never finishes an agreement until he has been asked for it many times." Such an advertisement is worth a dozen cards in the local newspapers, or the kindly flattery of your friends in the drawing-rooms of society.

**§ 9. Perseverance and patience.**—As a rule nothing grows more slowly in its youth than a legal clientele. Many a lawyer has become discouraged and retired from the profession for want of the cardinal virtues of patience and perseverance. Clients are won through the growth of the confidence the community has in the lawyer's integrity and ability; therefore, the beginner can not expect, nor is he entitled to a clientele of much consequence during his early novitiate. The newly admitted lawyer should not consider himself as endowed with all the qualifications of the tried and experienced lawyer; he is far from being like Minerva who sprang from the brain of Jupiter fully armed and equipped, nor is he by any means entirely ready for the battle of his professional life, or prepared to try every case, and perform every kind of legal business, no matter how difficult and intricate they may be. On the contrary, he must continue his legal studies and general culture, in order to fit him for the more active duties of his profession, gaining, in the meanwhile, all the practical experience possible. This is his probationary period, and he must not expect, during that time, to secure a volume of business equal to his desires and future expectations; such would be beyond his present capabilities or experience. His object should be to do, well and satisfactory to himself and to his clients, all that with which he is at first entrusted, and thus to prepare himself, both by the experience thus gained, and by the growth of his client's confidence, to win their and their friends' other and better professional employment.

**§ 10. Despise not the day of small things.**—The young lawyer's first business is likely to be small, very small, but he must remember that as a child he learned to creep before he walked, and to walk before he could run. Whatever he is asked to do, in the honorable line of his profession, let him do with all his might, promptly, thoroughly, and to the best of his ability, resting assured that every bit of work given him to do is a stepping-stone to more important trusts, and that every client won means many more to follow. His success may be slow-footed, but it will be certain; while he can comfort himself with the thought that he is not the first to await the appearance of clients and fees. On every side can be found leaders in the profession whose success has been won, not rapidly, but only after many weary years of waiting.

It is a truth, without denial, that the lawyer who has slowly increased his clientage is better fitted to maintain and increase it than one whose success has been more ephemeral. Rockets ascend rapidly, but the more permanent displays are accomplished with much greater care and labor, and are not followed by falling sticks. It will be universally admitted that the honorable, hard working, and practical lawyer who perseveres and sticks to it never fails to obtain a valued position in the profession, while those whose versatility and genius may have advanced them more rapidly in the beginning of the race sometimes fail to reach the goal. The fable of the tortoise and the hare is verified in the practice of the law, perhaps more often than in any other profession. There the race is not to the swift, but the

battle is to the strong, when the strength lies in the ability to persevere in the face of every obstacle.

**§ 11. Professional success is secured slowly.**—The advice of Chief Justice Sharswood, and of Dr. Warren, is worthy the attention of the young lawyer. Said the former: “Let business seek him; and though it may come in slowly and at intervals, and promise in its character neither fame nor profit, if he remembers that it is an important part of his training that he should understand the business he does thoroughly, that he should especially cultivate, in attending to it, habits of neatness, accuracy, punctuality, and dispatch, candor towards his client, and strict honor towards his adversary, he will find, it may be safely prophesied, his business grow as fast as it is good for him it should grow, while he gradually becomes able to sustain the largest practice without being bewildered and overwhelmed.”<sup>1</sup>

Dr. Warren thus addressed the members of the Incorporated Law Society of the United Kingdom: “Do not entertain extravagant expectations of success; if you do, the presumption is immensely strong that you will be disappointed, and that bitterly. He who will walk on tip-toe must soon be fatigued and exhausted, and the sooner, the greater his efforts. The strain and tension are unnatural; they can not possibly be sustained. Remember that confidence, from which alone springs professional employment, is a plant of slow growth, which must be very tenderly and patiently watched and nourished. The soil from which it springs must be rich and productive,

<sup>1</sup> Sharswood’s Law Lectures, 57.

being the perception, by others, of your purity and elevation of character, your modest, manly sedateness of habits and demeanor, your thorough knowledge of business, your incorruptible integrity; in short, your possession of those qualifications which it is the object of these lectures to urge upon you. Think not that this is the work of a moment. Forcing here will not do. The gourd that came up in a day, withered in a day. It is really a difficult thing to establish a connection; and you will probably, many of you, find it so, especially in these days of intense competition, when you will see, whichever way you turn your eyes, wherever you go, rivals swarming around you, all as eager as you, and possibly some abler, but many also far less scrupulous. I say this, not to damp your glowing hopes and energies, but only to guide them."<sup>1</sup>

**§ 12. The assurance of success.**—It can be said, and without contradiction, that success in the profession of the law has never yet failed, and never will be wanting, to those who possess the characteristics of integrity, industry, energy, promptness and perseverance. Ability and genius are potent factors, but greater than these, and naught without them, are those to which we have referred. Their careful observance will be followed by success as surely as day follows night. Dr. Warren, in describing the qualifications of the novitiate in the law, an articled clerk, as he calls him, so well describes the needed qualifications of the lawyer that his words are well worth the careful attention of the beginner in the

<sup>1</sup> Warren's Duties of Attorneys, 141.

profession. He says: "Speaking with due diffidence, yet after much reflection, and some years' observation and experience, I think that, in judging of the fitness of a youth for being articled to an attorney and solicitor, I should, *ceteris paribus*, expect a calm and sober temperament, promoting to perseverance and industry, and not likely to be irritated or disheartened by having to encounter difficulties. I should anxiously look for aptness for study, sound sense, clear-headedness, an energetic will, conscientiousness, especially in respect of veracity, and money matters, and if, in addition to these, I saw an affable disposition, an inclination to candor and liberality of sentiment, a courteous and gentlemanly demeanor and carriage, I would say, I have found the youth who will make a figure in his profession, who will prove himself, in due time, a discreet confidential adviser to even the ablest, the most refined, the most fastidious and exacting, the highest in the land, as well as, mark me, to the very humblest, feeling as lively and real an interest in the affairs of the latter as of the former, and never likely to treat with unfeeling indifference or levity, or hear

With a disdainful smile,  
The short and simple annals of the poor,

who is likely to shrink from no responsibility whatever, that he ought to bear; not to be daunted by the most formidable obstacles; nor tempted to go astray by the most dazzling opportunities. Far be it from me, gentlemen, to say anything so ridiculous as that none ought to enter the profession unless blessed with such endowments and qualifications;

but I conceive that this is something like the standard to be kept before one's eye, on such an occasion; and that the more of these qualities a youth possesses, the better and brighter his prospects; the more he will be likely to start well in the race of life; to ingratiate himself with all those whom he will have to encounter in professional and social intercourse, and on whom it is of vital moment for him to produce a favorable impression."

"If, on the other hand, I saw that a youth was of decidedly dull intellect; of a sour, ungracious humor and spirit; an unprepossessing appearance and address; of an irascible temperament; or of a mercurial and flighty disposition; acute enough, possibly, yet incapable of close attention; rash, loose, and hasty in what he said and did; prone to exaggeration, even up to the point of disregarding, knowingly, the dividing line between fiction and fact; with a perceptible tendency to tricking and overreaching—I would say, for heaven's sake stay! Don't send this lad into the law! You are committing a downright sin in so doing; exposing him to great misery; giving him, if he should be able to get into business, either as a partner or alone, the means of doing grievous mischief, and inflicting much suffering, of ruining himself and others! 'Look then, on this picture—and on this;' and let the proposed attorney's clerk approach as near to the one, as he should be at a distance from the other."<sup>1</sup>

<sup>1</sup> Warren's Duties of Attorneys, 49.

## CHAPTER II.

### THE LAW STUDENT, AND THE BEGINNER'S STUDIES

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§ 13. **The law student's general education;**—No other profession, so much as that of the law, requires for its successful mastery the broad and deep foundation of a liberal education. The lawyer who comes

to the bar without the fundamentals of a good education is sadly handicapped. A knowledge of history, of the languages, of literature, of rhetoric, of logic, indeed, of all the elements of a complete education, is essential, or, at least, most helpful to his success. The study of the law should never be entered upon until the student has this foundation established, and so well laid that upon it he can build his legal education. He needs knowledge, as thus acquired, to aid him in the study and the practice of the law, he needs the power of reasoning from cause to effect, of analysis, of collaboration, of mental discipline, and he must know how to acquire and how to use knowledge.

**§ 14. Chitty's educational qualifications of the attorney.**—Mr. Chitty, in describing the education required of articled clerks previous to and pending their service, so well sets forth what is needful to the lawyer of this day that we do not hesitate to give his remarks in full. He says: "With respect to the preparatory education of a youth intended for any department of the law, especially as an attorney or solicitor, it should be much more extended than has hitherto been customary. Parents would do well not to article their sons before they have finished with care and assiduity, at least, a good classical school education, and even that alone will scarcely be sufficient to enable a party afterwards to proceed through life with full advantage, much less to obtain great eminence. Even after the completion of a good school education, two or three years of study, under proper direction, of most of the useful sciences

before he is to be articled, would be highly advantageous. It should be remembered, that to proceed with facility through any professional pursuit, an attorney should at least be well informed of the dead languages, the Greek and Latin, from which so many scientific terms are derived, not indeed in law, but in other branches of knowledge and literature; for they may have to conduct suits and proceedings connected with every science, and therefore, some previous knowledge of each would be desirable, and especially a full knowledge of physics or natural philosophy. All branches of society have, particularly of late, so much advanced in knowledge, that unless a professional gentleman be well acquainted with an outline of most sciences, he will, when he starts in business, find himself too cramped in knowledge to act with safety, or without apparent embarrassment, from fear of exposure or error.”

“It should be further observed, that besides due knowledge of law and useful sciences, it will be of great importance that the youthful attorney should, as he progresses, study the distinguishing temperaments and characters of mankind, to which also the reading of biographical works would greatly contribute. He has to contend with the passions, the weaknesses of human nature, and not unfrequently even against the cunning and iniquity of mankind, and consequently an attorney or solicitor who is a mere lawyer will scarcely ever attain eminence.”<sup>1</sup>

In these days, when the avenues of education are open to every one, there is no excuse for the lawyer

<sup>1</sup> 1 Chitty’s General Practice, 13, 15.

who lacks these fundamental elements. The self-made man may become a successful lawyer, but he wins with much greater difficulty than his educated brother, while he always lacks the ease and flexibility, flowing from a liberal education.

**§ 15. The law student's preliminary examination.**

—It is now almost universal to require from one who desires to become a student of the law an examination in the elements of a general education. Those members of the bar who have served on committees of examination can recall instances where applicants have failed on questions which every school boy should be able to answer. Such a committee was once much edified to learn from one of a would-be class of law students that the battle of Waterloo was fought in Massachusetts; that Julius Cæsar, after he had conquered Britain, became a great pirate; that the avowed object of the crusades was to obtain tin, of which they stood greatly in need; and that the italicized words in the Bible were so printed to indicate that they were to be emphasized. Such a young man, if admitted to registration as a student, might, possibly, have acquired sufficient knowledge of the law, at least of the sound of its words, and an ability to parrot-like repeat the answers to questions in Blackstone, to have passed his law examinations, but that such a lawyer would be an honor to his profession is more than doubtful. The instance quoted may be an extreme one, but committees have generally found that more applicants for the preliminary examinations are rejected than those who apply for their legal or final examination.

**§ 16. Law schools and registered students.**—Law students in these days are almost entirely those of the law schools, or are registered in the office of practicing lawyers. The benefits of a law school, of which our country has now so many excellent examples, need not here be set forth, beyond the general statement that a student can best acquire a knowledge of the fundamental principles of the law in a school where he receives more personal attention from its professors and teachers, and where his studies are more systematically directed than in an office, where he must depend so much upon himself, and can have but scant attention from the busy lawyer with whom he is registered. Again, in a law school he has the benefits of class instruction; of the attrition gained by contact with other students; of large libraries; of moot courts, and of the spur of ambition in striving for his degree, and in winning the prizes given the assiduous student. In these schools he also has the benefit of special lectures in the various departments of the law, many of them by leaders of the bar, and particularly famed in their specialties. His legal education is thus broadened, and, being well directed, brings him to the bar with a more extensive legal knowledge than he could acquire in an office.

At the same time he picks up in the office of the active practitioner some details of the practical side of the profession, for which he has not the same facilities in a law school; still, as has been said, he loses that broad legal education which he so much needs through all his professional life, and which, after all, is of much greater advantage to him than the mere practical side he may have ac-

quired in the law office. The lawyer is indeed fortunate who, after the acquirement of the liberal education he can find in one of the best American colleges, completes his technical course in an excellent law school, and can then obtain a clerkship, for a few months, in the office of a prominent and active practitioner. This supplement to his legal education adds to his accomplishments that of some knowledge of the practical side of the law, which he will find of great benefit when he launches out for himself.

**§ 17. The beginner's legal knowledge.**—It has been well said of the limited period the student has for a preparation for the bar that "the most he can hope to do within that time is to get a pretty definite notion of what the law is, and the subjects of which its treats, together with some of its more important truths and principles; and, in doing this, to learn how to make further progress when he comes to the bar, by applying himself to the discovery of new principles, and learning how to make use of the knowledge he has and may acquire, in the business of solving questions as they arise in his practice. Starting in this way, every step he takes aids him in taking the next higher one in his course; till, after having acquired enough of their principles and their application to serve the ordinary demands upon a new beginner in practice, he may enter the profession, going as it were to a higher school, to pursue still further the science of which he has but acquired the rudiments."<sup>1</sup> In short, he acquires some knowl-

<sup>1</sup> Washburn's Lectures on the Study and Practice of the Law, 18.

edge of the fundamental principles of the law, and of their application to a given state of facts as presented to him in his practice. This, with the valuable faculty of knowing where and how to find the law, must complete the education of the student. It is, therefore, of the first importance that the principles of the law should be mastered before its practice is undertaken. The beginner must remember that when he is called to the bar his education is but commenced, rather than completed, and that during all his life he must continue to be an ardent student in his profession, knowing that he can not master all the law, even if he were vouchsafed the years of **a Methuselah.**

**§ 18. His legal studies after admission to the bar.**  
—At the commencement of his practice, the beginner is not likely to be so crowded with clients, nor his time so occupied, that he can not have at least some hours of the day to devote to his studies. He is now cast upon his own resources, and the direction of his studies is within his own control. Just what course those studies should take he is often at a loss to know, but it is important that they should be in a proper direction, and that they should be applied along lines of value to him in his professional career. It is the purpose of this and the succeeding sections of this chapter to attempt to give him some hints on this subject, proving, it is hoped, of value. As to his general legal studies, but little need be said. His own good judgment will tell him that it is of very great benefit to read the many valuable textbooks which have not been included in the student's curriculum; while those he has already followed,

especially in the leading lines of his legal education, such as elementary law, pleading, evidence, equity, contracts, etc., should be kept fresh in his mind, their review being time well spent.

**§ 19. Case law.**—The cases contained in the reports of his own state should demand his early attention, particularly the leading authorities, and especially those which may have varied the rules of the common law, as he has learned them, or which differ from the decisions of the other states. The profession find it of great value to read the reports of their state as they are published, and where they are given in advance sheets they are of still more value. The young lawyer would do well to carefully follow these new decisions, and in doing so he will find that in a comparatively few months he has traveled over a large part of the general field of the law, and will thus be able to put himself well abreast of the trend of the decisions of his state.

If he has chosen one of the special lines of the profession it is needless to say that the studies of the novitiate will be directed very largely in that course, nevertheless, there are subjects the beginner should pursue, which are essential, whether he is a general or special practitioner, subjects probably not within the line of his preparatory legal education, but, at the same time, of practical aid to him in his profession. These we will consider in the succeeding sections.

**§ 20. The federal and state constitutions.**—While every one worthy the name of a student has, probably, learned something of the constitution of the United States, nevertheless, the lawyer should make

it his study from a legal standpoint, fortifying himself with a thorough knowledge of its prohibitions, limitations and constructions, in order that he may be prepared to bring his cases within its crucial tests. All this is equally true of his state constitution, which also demands his close and studious attention. It is the fundamental law of his state, and the lawyer should be prepared at all times to test the questions arising in every case by the rules of that constitution.

Illustrating this constitutional test is the case of *Rogers v. Manufacturers Improvement Co.*, 109 Pa. St. Rep. 109. Here, recovery was sought by a corporation claiming the right to collect tolls upon logs floated down a stream, the charter giving it in plain terms a corporate franchise to levy such charges. The case seemed hopeless for the defendant, and the verdict went against him in the court below. On appeal, the judgment was reversed, it being held that the title of the enactment creating the corporation plaintiff did not clearly express the subject of the act, as was required by the state constitution. Not only was the action thus defeated, but the value of the plaintiff's charter was practically destroyed, and large sums invested by its incorporators lost beyond recovery. Had the framers of the act borne in mind this plain requirement of the constitution all this could have been avoided, and had not the defendant's counsel been familiar with that requirement the result would have been a verdict against his client for the plaintiff's claim.

The study of the constitution should include its terms and provisions, as well as the cases construing it, or which may have been controlled by its con-

structions and prohibitions. It is suggested to the beginner, with the utmost earnestness, that a familiar knowledge of the state and federal constitutions should be acquired at the earliest possible moment, and that this knowledge should be of a nature to enable him to readily refer to them, so that he will be prepared to recite and explain their very words, especially the articles and sections relative to the judiciary, legislation, private and public rights, and to all of its parts particularly applicable to the lawyer's practice.

**§ 21. Statute law.**—Assuming that, while a student, the beginner's legal studies were more confined within the lines of the common law, rather than extended to the statutory law particularly applicable to the state chosen for his field of practice, or to the federal statutes, these subjects are now called to his attention for his early consideration after his admission to the bar. A knowledge of statute law is required for the solution of questions arising under its terms, and, equally, because those statutes have often changed or modified the rules of the common law, and may have very materially altered the principles he learned to follow while a student.

Every state has a digest of its statute law, usually annotated with the decisions of its courts construing those statutes, and the beginner, with the aid of his preparatory studies, should have no difficulty in early familiarizing himself with the written law of his chosen state. Where there is a code, it goes without saying that he must give it his thorough study, and master it so far as it lies within his power. Indeed, wherever he locates, he should make himself familiar

with the statute law of his state before he commences active practice, and should be prepared at all times to refer to it with readiness and assurance.

**§ 22. An example of a statutory change of a common rule.**—Instancing a change of a common law rule by a statute, the writer has in mind an action brought upon a note signed by the defendant as a surety, where the principal maker had subsequently become insolvent. The defense, set up by the pleadings, was to the effect that the defendant had pointed out to the plaintiff certain property of the principal from which, it was alleged, the note could have been collected had process then been instituted against him, as the defendant demanded it should be, and, failing in that, it was claimed the surety was discharged. At the trial the plaintiff made *prima facie* proof by showing the execution of the note, and, offering it in evidence, rested. The defendant showed the solvency of the maker of the note at the time of the notice, and proved the notice, stating that it had been given orally. The defendant then rested, and, no further evidence being offered, his counsel moved for binding instructions for a verdict against the plaintiff, citing numerous authorities to sustain his position, all of which clearly established the common law rule to that effect. The defendant's counsel expressed the utmost confidence in the result, adding that the plaintiff's attorney, through youth and ignorance, had unwisely permitted his client to become liable for the costs of the action, which could only be ruled against him, regretting that he had not given the authorities more attention, etc.; all of which, if it had been true, would have

been a severe criticism upon the young lawyer's legal knowledge. He, however, was enabled to turn the tables upon his adversary, by producing an act of assembly, then but lately enacted, providing that such a notice must be in writing. He was much comforted, as well as relieved from the strictures of his opponent, when he saw the defendant's counsel, after scowling at the statute, quickly gather up his books and papers and retire from the court room, leaving his client to pay both the verdict, and, as well, "ill-advised costs."

**§ 23. Federal statutes.**—For similar reasons the beginner must devote some attention to the Revised Statutes of the United States; chiefly on the subjects of courts, their jurisdiction, procedure, criminal provisions, etc. He may be called upon, sooner than he may anticipate, to institute or defend a civil action, or to defend a prisoner, in the federal courts, and should have sufficient familiarity with the statutes of the United States to properly bring and try his case in those courts. The earliest knowledge he needs in this direction is as to the jurisdiction of the federal courts, their organization and powers, and the provisions enabling him to remove thereto a cause from the state courts.

**§ 24. Practice in the state courts.**—It would seem almost superfluous to say that the practice of the law, as administered in his state, should command the beginner's early attention. Its prime necessity is most apparent. Nearly every state has local textbooks upon this subject, and these the lawyer must master or he is like a ship at sea without sails or rudder. It is not difficult of accomplishment to one

who has obtained a knowledge of the fundamental principles of the law, and will be found to be a very entertaining subject for study. The beginner will soon learn that his first troubles, and his earliest errors, concern questions of practice,—the knowledge of how to do things. It is, like every other branch of the law, a subject in which he never can become perfect, for the obvious reason that the many and various questions of practice he is called upon to solve, will present difficulties, as to the manner of their solution, where he will often find himself without a precedent to guide him. Still, it is a department of the law in which, by labor and experience, he can become the most proficient, and where, by close investigation and observation, he will be able to follow the true path, and will find, as his practice increases, that he will be enabled to meet its many and varied requirements.

**§ 25. A skillful practitioner is a good lawyer.—** Skill in practice is one of the signs of a good lawyer, while the absence of that quality, particularly with his clients, is very likely to lower his professional reputation. “The public will sooner overlook and pardon an error in judgment, or a mistake in a legal conclusion, than excuse a blunder in doing a piece of business. It is difficult at times to form a conclusion whether a legal opinion is correct or not, whereas most mistakes in doing business are patent and palpable.”<sup>1</sup> The importance of an accurate knowledge of practice, and of the manner in which the papers in his case are to be prepared, will be

<sup>1</sup> Washburn’s Lectures on Study and Practice of the Law, 28.

appreciated by the lawyer when he meets with those of his opponents who seem to prefer to rely upon technical objections, rather than upon the merits of their cases. Such technicalities are usually brought to bear upon some alleged informality in the pleadings or procedure of the cause. Such men are found at every bar, and, while their tactics are not always governed by strictly ethical rules, or by generosity towards their opponents, they must be met and defeated on their technical defenses. Here the accurate lawyer will find full need and use for his practical armament, and will feel well repaid for his efforts in obtaining proficiency in that direction.

A great boon to the profession is the lately published Elliott's General Practice. It is an exhaustive treatise of the subjects relating to the preparation and trial of causes, and covers all of that ground most thoroughly. It is of value to the lawyer, wherever he may locate, and is a modern and model text-book.

**§ 26. Federal practice.**—An act of congress provides that the practice, pleadings and forms and modes of procedure in the United States circuit and district courts, in civil cases, other than equity and admiralty cases, shall conform, as near as may be, to that existing in like causes in the courts of record in the state where such federal courts are held.<sup>1</sup> Hence, in law cases a knowledge of the practice of the state courts is generally sufficient; but for equity and admiralty causes, and for the purpose of being familiar with all the details of federal procedure, the

<sup>1</sup> Revised Statutes, § 914.

lawyer who expects to have any business in those courts must become conversant with their practice. Among the leading text-books of procedure in the federal courts these may be noted: Foster's Practice in United States Courts, Desty's Federal Procedure, Shiras' Equity Practice in Circuit Courts, Thatcher's Circuit and District Courts, Loveland's Forms of Federal Procedure, Desty on Removal of Causes, and Dillon's Removal of Causes.

**§ 27. Learning practice outside of text-books.—** There are some ways in which the lawyer can solve questions of practice, when he can find no certain rule laid down in the local work, or where the circumstances of the case may vary the general rule. One of these is to carefully study reported cases in line with the one he has in hand, and there find what were the process and procedure then had. Not always will he be successful in that direction, because the report is more likely to be confined to the question of law adjudicated than in showing in detail the manner in which it was raised. Still, he will often pick up valuable hints of much assistance, and, frequently, will find just what he wants. If the procedure there had has resulted successfully, and the decision is in accord with that practice, he is justified in taking it as his guide. If the decision does not sufficiently enlighten him, he may find it wise, where the matter is of sufficient importance, to examine the full record of the case, to be found in the court from which the appeal is taken, and, sometimes, preserved in printed form. Thus, in some states, public law libraries have full printed records of the cases adjudicated in its courts of last resort,

and reference to those volumes may be of value. Another plan is to search among the records of his own courts, where he may find causes proceeding upon grounds similar to his case, and may thus be well guided; remembering to follow only in the footsteps of those who are regarded as leaders of the bar, and who have the reputation of careful, skilled and accurate practitioners.

**§ 28. The reason for the rule of practice must be mastered.**—The true plan is to study the reason for the practice laid down as the general rule, either in the works on practice, in the rulings of the courts, or in the words of the statute, and when he has discovered the principle involved the lawyer will be able to solve the questions arising under exceptions to the general rule. In short, the ordinary practice can readily be ascertained, but the exceptions must be conquered by applying logical reasoning to the general rule and ascertaining its very grounds and principles. The lawyer's knowledge of practice gained without a thorough understanding of the reasons for its rules may suffice in a common case, but will not stand him in stead when he meets with questions not within the familiar and well-worn path of the general rule.

The solution of intricate questions of practice, when the beginner has exhausted every other avenue for personal research and investigation, may often be had by an application to an older and more experienced member of the bar. It is almost the only exception to the general rule that the beginner—and the older lawyer as well—should never depend upon

others to advise him in his own practice; a subject which is discussed more at length in another place.<sup>1</sup>

**§ 29. Forms of procedure and conveyancing.**—Although closely allied with practice, indeed but a branch of it, this subject should receive careful attention. Forms of procedure, in probably every state, are set forth with more or less particularity in works known as form books, covering the leading subjects, while the others can be obtained, in the absence of such books, by a careful examination of the records and processes of the courts. Forms of procedure include those used in the inception of a cause, in its pleading, in its various stages, and at trial, including those necessary for the appeal, as well as in the recovery, after final judgment, of the matter in litigation. These forms are, of necessity, very numerous, and it is not to be expected that the beginner can at once become familiar with them all in their various details. Indeed, throughout his professional life, he will find forms to be used where he is almost entirely without a precedent to guide him, and where he must largely depend upon his own inventive genius. At the outset, the beginner should familiarize himself with the forms pertaining to the more simple actions; such as assumpsit, trespass and replevin. Among his early duties, for example, may be that of bringing an action upon a promissory note; he should know in whose name it is to be brought, the form for and the manner of obtaining the writ, and the procedure necessary to obtain judgment by default, or to frame the issue for trial. While form

<sup>1</sup> Chapter iv, §§ 44, 45.

books are of advantage to the beginner, as well as to the more experienced practitioner, too much reliance can not be placed upon them, as no cast-iron rule can be made to fit every case. The reason for the form should be mastered, and then it can be more readily adapted to the various changes required by the circumstances of the case.

As to forms of conveyancing, the beginner should have but little difficulty, as blank deeds, mortgages, bonds, leases and the like, in current use in his state, can be obtained from a law stationer. In addition, in doubtful cases, an examination of form books, or an investigation of the land records, may enable him to find a precedent fully covering his needs in that direction.

**§ 30. Rules of court.**—Rules of court are regulations of a definite character, and, in a restricted sense, are minor laws governing the practice and procedure of the tribunal by whom they are framed. Hence, it is essential that the lawyer practicing in a court should become familiar with its rules. These should be thoroughly learned and understood by the beginner, as they will be found necessary at the very outset of his practice, and of daily application to his professional business. He should not hesitate to ask the clerk of the court, usually familiar with its rules and customs, or any more experienced practitioner, or even the judges themselves, to inform him, if unable to ascertain for himself, if a rule of court exists upon a given question of practice, and, if it does, how it has been construed with reference to matters similar to the one in hand.

**§ 31. Leading cases and legal literature.**—Among the early studies of the young lawyer none can be of greater benefit than a careful examination of cases, both to master the principles of law there pronounced and to ascertain how the cases were carried on; in short, to learn the practical side of causes. If he will read the full reports of celebrated trials he will learn how to examine and cross examine witnesses, how to present the points, how to make an argument, and, generally, how to conduct a cause. He must do more than to merely read the case, he must study it thoroughly, and master it in detail. He can readily find such cases, and they will be found to be both instructive and entertaining reading.

In line with these readings there is a literature of the law which the beginner will find of much benefit, at the same time furnishing him with entertainment. The list given is a somewhat mixed one, but includes books worth his while to secure. Such are Campbell's Lives of the Chief Justices of England, and Lives of the Lord Chancellors; Foos' Memories of Westminster Hall; Hortensius, the Advocate; Morse's Famous Trials; Harris' Before and At Trial; and, in the lighter vein, Warren's Ten Thousand a Year; Harris' Farmer Bumpkin's Law Suit; Brown's Humorous Phases of the Law; The Lawyer's Code of Ethics (a satire), and Baldwin's Flush Times in Alabama and Mississippi.

**§ 32. Rhetoric, logic and forensic oratory.**—Taking it for granted that the study of rhetoric and logic have formed part of the lawyer's education, it can not be amiss to remind him of the value of a continuation of his studies in those directions. That

a thorough knowledge of these branches of a general education is of value to the lawyer is most evident. In forensic oratory he can never become too proficient. The gift of speaking well and forcibly is one of the strong elements of the successful advocate. While it is often one of Nature's gifts, it can also be acquired by those who are not "to the manner born."

As a text-book in forensic oratory, Professor Robinson's most valuable work, in that title, can not be too highly recommended to the lawyer. It is worth his careful study, and will be found to be of the greatest benefit in the trial and presentation of his causes.

**§ 33. Professor Washburn's remarks on rhetoric and oratory.**—Professor Washburn, of the Harvard Law School, has well described the value of these studies to the lawyer. He says: "There are few powers in a young man more susceptible of being educated by care and perseverance, provided he has a reasonable store of learning and good sense, with that of thinking and expressing his thoughts in a clear, orderly and convincing form; so that, while the fluent man may have to be checked, the timid and self-distrustful one should be cheered and encouraged to make the effort to overcome his hesitancy of speech, or confused thought. \* \* \* In the first place, I would have a student get a clear conception, in his own mind, as to what he should aim at in this matter of addressing others. Let him understand that the power of making a speech is not an *end*, but a *means*. As a lawyer he is not to get his living by amusing and entertaining others with the

flowers of rhetoric and the graces of elocution, but by convincing their judgments and persuading them as to what they are to do. \* \* \* If I were to advise a young man how he could most likely succeed in becoming an effective public speaker, or advocate in court, I should first advise him to train and educate the various faculties and functions of his mind, with a view of gaining knowledge. I would then insist upon his patiently and persistently endeavoring to lay up a stock of this commodity, and gather ideas from what he reads and hears and sees. Let him, in the meantime, accustom himself to some of the best models of English style, with a reference to plain, simple and expressive language, and clear and comprehensive forms of expression. Let him bear in mind that, as a lawyer, he will have two parts to act and two lives to live; and that he must, consequently, have two styles to cultivate and use,—one for the court-room, the other for the world outside of it. If in doing this he watches the operations of his own mind, he will find that so far as the use of language is concerned, the same rules of acquiring and applying it appertain to both these relations in which he stands to the rest of the world. He has not only constant occasion to say something, but, to make himself understood, he must say it clearly and distinctly; and if he does not understand a thing himself, he can not make it intelligible to others. In other words, to address an argument to a court or jury, he must go through the same processes by which he would seek to convince his neighbor or stimulate to action a popular assembly."

"As to how he shall get a ready command of apt

and intelligible language in which to clothe his ideas or argument, much may be done by cultivating good habits of style, by familiarizing himself with the works of the best English authors; not with a view of copying them, but of imbibing their tone and spirit, and, at the same time, becoming acquainted with the language and forms of expression which they make use of. Let him, in this connection, accustom himself to putting down his own thoughts in his own language upon such subjects as interest him, in the form of a composition or essay, and he would often be surprised at the greater ease with which he expresses what he thinks, and 'the wider range through which his thoughts expand themselves.'"<sup>1</sup>

**§ 34. Moot courts, mock cases and quiz clubs.**—Following a similar custom prevailing in the law schools, the young lawyer will find much assistance, and acquire no little practice, by taking part in moot courts, organized among the juniors of the bar. Here, opportunity will be given him to prepare and argue questions of law, thus giving him practical experience of value in his professional business, and materially assisting him in developing his abilities as a lawyer. The opportunities for debate thus given him are, alone, very advantageous, and when the beginner can take part in a moot case he gains some personal experience in preparing a brief and arguing questions of law, proving of practical value in his real practice. He will, also, be likely to overcome some of the awkwardness and embarrassment he will probably suffer when called to try his first case in

<sup>1</sup> Washburn's Lectures on the Study and Practice of the Law, 79-81.

court. Such an association could add the benefits of mock trials, where witnesses are examined; and quiz clubs, for examination in the legal studies of their members, as, also, the preparation of opinions on stated questions of law.

Of the great Lord Mansfield, his biographer says: "He never had the advantages of being initiated in the mysteries of legal warfare by any practitioner. He attended a debating society, where knotty questions of law were discussed; and such pains did he take in getting up his arguments, that the notes he then made were frequently of use to him when he was at the bar, and even after he had been elevated to the bench."<sup>1</sup> Fulbeck, as early as 1599, said: "Students of the law ought, by domestical moots, to exercise and conform themselves to greater and weightier attempts, for it is a point of warlike policy, as appeareth by Vegetius, to train young soldiers by slight and small skirmishes for more valorous and haughty proceedings."

**§ 35. Book-keeping, accounts, and business and banking methods.**—The beginner's attention should be directed, in the course of his studies in preparing for the active practice of the law, to the practical forms of business, such as book-keeping and accounts. A thorough knowledge of these things is of much benefit to the lawyer. Such a large portion of practice has to do with commercial affairs that to understand them, in their various details, is to put him in a position to comprehend, without difficulty, many of the questions he meets with in his daily professional

<sup>1</sup> Lord Campbell's Lives of the Chief Justices, Vol. iii, p. 221.

business. Again, this knowledge is of benefit in preparing contracts, in the settlement of partnership affairs, and of the estates of decedents and of insolvents. So, also, should the lawyer's knowledge of business affairs include methods of banking and the practical questions arising as to forms of negotiable paper. In short, a good business man, with the addition of a sound legal education, should make a skillful and successful lawyer.

**§ 36. Business men make the best clients.**—It is not to be forgotten that the clients from whom the lawyer must expect the largest amount of professional business are those of the commercial class. His familiarity with the forms and details of everyday business life must, of necessity, give him a standing and prestige in their eyes, and form one of the reasons for his employment in their legal affairs. It is the business men of the community who form the bone and sinew of its progress and enterprise; by them are new industries started, organizations and combinations formed, corporations created, and their affairs managed and controlled. The lawyer can count himself as fortunate if he secures their confidence and is intrusted with the charge of their legal affairs. If of two lawyers, both of equal legal learning and character, one is to be chosen as the legal adviser of the business men of the community, it can not be doubted that it will be the one most familiar with commercial affairs. In this connection it may be suggested that some knowledge of the manufactures of his community is valuable to the lawyer. In these days, every town of any size usually has one or more industries for which it is

famed. Therefore, it is wise for the lawyer to obtain some acquaintance with the details of those classes of business, for he is likely to be called upon to treat questions arising in such departments of trade, and should be in a position, not only to understand himself, but to be able to explain to others the various processes used in producing such articles of manufacture.

## CHAPTER III.

### CHOOSING A LOCATION.

- § 37. The importance of this choice.
- 38. His course when the choice has been made.
- 39. City or country?
- 40. A specialty in the profession better followed in a large city.
- 41. The choice of a smaller city.

§ 37. **The importance of this choice.**—Presupposing that the newly admitted member of the bar, or the recent graduate of a law school, is casting around to decide where to locate, these suggestions are offered as, possibly, of some interest at this time. This choice is a matter of the greatest importance to the young lawyer, its solution to be sought with much care, and determined only after mature deliberation. Before making the selection he is to remember that the place he chooses should be adopted as his permanent home. In the profession of the law, more than in any other, it can be truly said, “a rolling stone gathers no moss.” Once established, the lawyer should pursue his professional career without change. He becomes identified with the community in which he lives, and the associations and connections there made may not permit him to obtain an equally good footing in any other locality. It is to be remembered that a clientage is obtained by, and very much de-

pends upon, the confidence the community has in the lawyer's character, ability and adaptation for legal business. This confidence is, of necessity, slowly won, but when secured can, by the exercise of the same qualities which built up his clientage, be retained throughout his professional life. A lawyer's clientage is very largely a personal following, and as men rarely change their solicitors, when found to be satisfactory, it is but tempting fortune to seek another location when once the lawyer has secured a fair beginning.

**§ 38. His course when the choice has been made.**—When he has made his selection the young lawyer should make these rules the guide of his conduct. Show to the citizens of your town that you have come to stay; take part in affairs of public interest; put yourself abreast of the vital local questions; make friends surely and, if you can, rapidly; if you have money invest it at home, indicating to your fellow-citizens that you are interested in the growth of your town, and that you are not one of those who have all to gain and nothing to lose; establish a reputation for energy, integrity and promptness; learn all you can, do all you can, and both as well as you can. If to these qualities you add patience and perseverance you will soon begin to accumulate a clientage, while, in time, you will be regarded as one of the leading lawyers of the community, and will find that you have earned a reputation which you well deserve, and one which can be preserved throughout your whole career.

**§ 39. City or country.**—The beginner's first question may be: Shall I locate in the city, or in the

country? By these words are meant the great metropolitan centers, as distinguished from the smaller cities and larger towns of the country. It could hardly be worth his while to give any consideration to rural communities, for the volume of business there found could never be sufficient to satisfy the ambitious lawyer. If his financial affairs will permit him to establish himself in one of the great cities of the country, such should be his choice. But he must remember that there he will be compelled to longer depend upon his private resources before he can reap the rewards of his profession. In a large city he will, necessarily, be a longer time in acquiring a clientage, but, when once secured, he is assured of a wider field and of more opportunities for professional advancement. It will require a longer period, and greater patience, to successfully launch his craft among the many competitors he will find in a great city, but when once the breezes fill his sails he can rest assured of more certainly reaching the port of every lawyer's ambition,—professional fame and its golden rewards.

In a great metropolis there is no end to the opportunities of the lawyer, and when he begins to be famous the only limit to his clientage is that of time to give it attention. There he will have much with which to contend, more temptations to avoid and disappointments to overcome; yet if he avoid these rocks, and outride these storms, he is sure, with pluck, energy and integrity as his mates, to secure in the end the greater prize, and to sometime find his ship sailing the ocean with his slow competitors in the dim distance of the rear.

**§ 40. A specialty in the profession better followed in a large city.**—Again, if he choose one branch of his profession, in preference to the entire field of the law—as he is more likely to do in a very populous community—he will find greater opportunities to excel in his specialty than he could hope for in places where that class of legal employment is more rarely required. It is doubtful if it be so delightful to confine one's attention to a particular line in the profession as it is to have to do with the variety of the law in its practical application to the multitudinous affairs of men, and in all their varied relations in life; still, it can not be denied that the lawyer, like his medical brother, acquires greater fame and fortune by following one branch of the profession, than in working in its entire field. A learned jurist once said: “God forbid that one man should know all the law,” but it could not be a transgression to master one of its departments. We can not be great in all things; we may be in one.

**§ 41. The choice of a smaller city.**—To those, however, whose condition in life requires a more immediate return than can be expected in localities where the bar is overcrowded, or whose tastes lead them to prefer a home in a smaller community, it is suggested that a location should be sought in a growing, active and progressive center. There are in this country many places, yet in their infancy, or in vigorous youth, where the opportunities for professional success are very great. It is to such a community that the lawyer, not able, or willing, to locate in a great city is directed. Avoid those places where progress is a thing of the past, and the busy

hum of industry has left, never to return, or, perhaps, has never been heard, but seek, rather, a commercial center, where progress and activity rule, and where dwell men who have at heart the material interests of their town, and do all in their power to advance her welfare and progress. Such a community will have trade, exchange, manufactures and business, from which the active, energetic and trustworthy lawyer can expect to obtain professional employment. That there is already a crowded bar need not deter him. If he have the qualities and characteristics of a good lawyer, and adds to them those of energy, industry and perseverance, he will reach, in time, that position at the bar which Daniel Webster said was never crowded,—the top of the ladder.

## CHAPTER IV.

### LAW PARTNERSHIPS.

- § 42. Advantages of association with an established practitioner.
- 43. Some disadvantages in such an association.
- 44. Danger of losing confidence in himself.
- 45. Value of self-reliance.
- 46. Partnerships between lawyers of equal experience.
- 47. The growth of law partnerships.

**§ 42. Advantages of association with an established practitioner.**—It would seem superfluous to say that the beginner at the bar is indeed fortunate if he has an opportunity for association with one already established in the profession. He is assured an income by at once entering upon an earning career; while alone he might be obliged to wait some time before receiving anything more than nominal earnings. He would immediately be given something to do, and, being placed in a position where his services are forthwith required, would have the satisfaction of becoming a practicing lawyer from the start. If such an arrangement could be effected with one who would take the young lawyer as a partner and associate in his practice, and is a man worthy his confidence and respect, with tastes and temperament not incompatible with his own, it would, probably, be the means of advancing him more rapidly in his profession than would otherwise

be possible. The beginner would thus have given him an opportunity without which many a young lawyer has long been obliged to await a clientage. To those whose necessities demand some immediate financial return, a partnership with an older practitioner is an advantage which it would be unwise to reject.

**§ 43. Some disadvantages in such an association.**

—The beginner must remember that he runs some chances, and is under some disadvantages, in forming a connection with an older lawyer. He is but a fledgeling at the law, and to be placed at once, and without experience, in the midst of the battle, gives him responsibilities which can not be assumed by every one, or, if undertaken, may result in serious misfortune and loss of reputation. The profession of law is not one into which the beginner can jump without some experience. There may be those who are so highly favored by nature as to be fully equipped from the time of their admission to the bar, but to most mortals, the practice of the law, as well as its principles and the proper application of its rules, can not be mastered so quickly or readily. As we have already said, the lawyer who acquires his practice step by step, leading slowly, but none the less surely, from the lesser to the greater walks of the profession, will, in the end, secure the greater prominence, and be better fitted to reap its rewards. Naturally the junior must expect to occupy a very subordinate position to his senior partner, and may find himself not much more than a clerk, without opportunity of sharing, even in a slight degree, in that portion of the practice requiring the employment of

talent and skill; thus being unable to assert his own individuality, or to exercise his own mind in the solution of the intricacies of the law.

**§ 44. Danger of losing confidence in himself.—** The most serious risk the young lawyer takes in his association with an established practitioner is the danger of losing his self-reliance—one of the principal elements of professional success—by learning to depend too much upon the advice and assistance of his experienced associate, rather than trusting to his own efforts and good judgment. Insensibly, such a partnership is likely to result in the junior's submitting everything to the decision of his senior. He advises his client, not from his investigation of the law, and from his own judgment, but, simply, as repeating the opinion of his partner; he tries his cases, even trivial ones, only at the elder's elbow; he draws all his papers with that assistance, and, generally, becomes not very much more than the echo of his associate. All this goes well enough so long as he has this help, but some day it is taken from him, and then he is forlorn indeed. He is without individuality, he lacks self-confidence, and finds himself worse off than one of his fellows who, unaided and alone, has mounted the ladder and now stands high in his profession; confident, self-reliant and with a clientage earned for himself, not inherited. It is this risk which should be remembered when the youthful lawyer is considering the advantages of such a partnership. The beginner who avoids the dangers to which we have just referred, and has a partnership with an older and a good lawyer, has every oppor-

tunity, with the aid of his own well-directed talents, to earn a valuable clientage.

**§ 45. Value of self-reliance.**—It is this quality of self-reliance that is of inestimable value to the lawyer; without it he can never prosper in his profession; with it he has mastered one of the potent factors of success. Every lawyer knows members of the bar who never take a step in any direction, important or otherwise, without seeking the advice of their brethren; such a man is not and never will become a successful lawyer. A habit of that sort grows apace, and in the end is destructive of personal ability. The beginner need not be discouraged from asking the advice of his older brethren—counsel he will always find most cheerfully and willingly given—but he should not do this until he has exhausted every avenue open to him for personal investigation and research. He had much better find what the law is from the reported decisions and text-books than from those members of the bar whom he respects as his seniors, who will often feel that he depends too much upon them, and thereby will not advance in their esteem, while, if he is one who relies upon himself, although occasionally he may err in judgment, he has won the valuable réputation of self-confidence and industry. The writer well remembers, in the early days of his practice, the well-meant, though somewhat brusque, answer he received from a famous lawyer to whom he had applied for information as to what was the law upon a given question. “Young man,” said he, “go to your books and, if you like, use mine, and when you have

gone over every index and through all the digests, and then can not find the law come to me and I will tell you ; I know what you wish to know and would gladly tell you, but I do you a greater favor in making you find it for yourself. In this way you will learn something you will never forget, and, still better, you will learn to search the law for yourself. Now, you may think me unkind, but in the future you will say that I have done you a greater favor in refusing your request.” That man has long been in his grave, but I feel for his memory the deepest gratitude. Would that every young lawyer could have the same lesson I then learned.

**§ 46. Partnerships between lawyers of equal experience.**—Returning to the subject of partnerships, from which we have somewhat strayed, the attention of the beginner is called to the value of an association with another of his own age and experience. The writer freely asserts that two young men who start together in the law as partners, each with the characteristics to which reference has been made in an earlier chapter, and, added to those, consideration and generosity toward one another, have many advantages over those who begin alone. Their combined funds will purchase a larger library and afford a better office ; the volume of business will seem greater than if in two parts, and thereby more rapidly draw further employment; together they can prepare and try a cause, and perform legal services with better results than if alone; and last, but by no means least, can so arrange their time that during business hours their offices are rarely closed,—a valuable assistance in gaining and holding clients. Speaking

as one who formed a partnership with a young lawyer with whom he was admitted to the bar, an association which has since continued most harmoniously and pleasantly, the writer confidently refers such an arrangement to the careful consideration of the beginner in the profession.

**§ 47. The growth of law-partnerships.**—The growth of partnerships in the practice of the law during late years, particularly in the greater cities, is worthy of note. That it is mutually advantageous is evident from their large number. Some of the law firms of the chief cities of the country include several members, to each one being assigned that portion of the law for which he is specially fitted; thus enabling an office of that sort to take charge of every branch of the practice, and to secure a clientage much more valuable than could be the total of the individual efforts of its members. An ideal law firm would be one so organized and equipped that every case, or class of professional business, could be assigned and properly cared for by one of its number, and that at all times, and under all circumstances, every client, great or small, could secure the best of attention and be so well cared for that he would suffer no delay, nor be disappointed in the results, so far as they were secured by the efforts of his attorneys. That there are such law offices in this country is well known, and when their system is understood, and their methods known, it is not difficult to understand why they are so prosperous and enjoy such large clientages.

## CHAPTER V.

### LEGAL ETHICS.

- § 48. The imperative necessity for the lawyer's obedience to ethics.
- 49. Sharswood's Legal Ethics.
- 50. The prohibitions of the Noblesse de la Robe.
- 51. Those to whom the lawyer owes duties.
- 52. The lawyer's duty to the court.
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- 54. To use no falsehood or deceit.
- 55. The lawyer's duty to his professional brethren.
- 56. The lawyer's success is promoted by the respect of the profession.
- 57. Friendships at the bar conducive to professional employment.
- 58. The lawyer's duty to his client.
- 59. The lawyer is the keeper of his client's conscience.
- 60. Choosing and refusing causes—The ethics of defending the guilty.
- 61. The lawyer is not required to prosecute an unjust cause.
- 62. Professional compensation—The *honorarium*.
- 63. The right of the lawyer to compensation.
- 64. Retainers and contingent fees.
- 65. Ethical rules governing contingent fees.
- 66. Compensation should be commensurate with the services rendered.

**§ 48. The imperative necessity for the lawyer's obedience to ethics.**—The scope of this work will not permit of more than a passing glance at the important subject of legal ethics; a subject which demands the thorough study of every lawyer, and requires its rules to be thoroughly learned and forever followed.

No man can become a great lawyer, or maintain his rank in the profession, whose professional life is not always, and without exception, governed by a strict observance of the ethics of the law. It lies at the very foundation of his foothold at the bar; it environs him at every stage of his professional success; and, when his course is run, it remains the chief corner-stone of the edifice of his fame. No lawyer ever followed its precepts more closely, and no judge was ever more governed by its laws, than that eminent jurist, the late Chief Justice Sharswood. His lectures on legal ethics deserve a place of honor in the library of every lawyer, and we do not hesitate to incorporate something of what he has there said.

**§ 49. Sharswood's Legal Ethics.**<sup>1</sup>—“Let it be remembered and treasured in the heart of every student, that no man can ever be a truly great lawyer, who is not, in every sense of the word, a good man. A lawyer, without the most sterling integrity, may shine for a while with meteoric splendor; but his light will soon go out in blackness of darkness. It is not in every man's power to rise to eminence by distinguished abilities. It is in every man's power, with few exceptions, to attain respectability, competence and usefulness. The temptations which beset a young man in the outset of his professional life, especially if he is in absolute dependence upon business for his subsistence, are very great. The strictest principles of integrity and honor are his only safety. Let him begin by swerving from truth or fairness, in small particulars, he will find his character gone—

<sup>1</sup> Page 168.

whispered away, before he knows it. Such an one may not indeed be irrecoverably lost; but it will be years before he will be able to regain a firm foothold. There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things we hold dearest on earth,—our fortunes, reputations, domestic peace, the future of those dearest to us, nay, our liberty and life itself, we confide to the integrity of our legal counselors and advocates. Their character must be not only without a stain, but without suspicion. From the very commencement of the lawyer's career, let him cultivate, above all things, truth, simplicity and candor; they are the cardinal virtues of a lawyer. Let him always seek to have a clear understanding of his object; be sure it is honest and right, and then march directly to it. The covert, indirect, and insidious way of doing anything, is always the wrong way. It gradually hardens the moral faculties, renders obtuse the perception of right and wrong in human actions, weighs everything in the balances of worldly policy, and ends most generally in the practical adoption of the vile maxim, 'that the end sanctifies the means.' \* \* \*

"There is no class of men among whom moral delinquency is more marked and disgraceful than among lawyers. Among merchants, so many honest men become involved through misfortune, that the rogue may hope to take shelter in the crowd, and be screened from observation. Not so the lawyer. If he continues to seek business, he must find his employment in lower and still lower grades; and will soon come to

verify and illustrate the remark of Lord Bolingbroke, that ‘the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious.’

“While such are the depths to which a lawyer may sink, look, on the other hand, at the noble eminence of honor, usefulness and virtue to which he may rise. Where is the profession which, in this world, holds out brighter rewards? Genius, indeed, will leave its mark in whatever sphere it may move. But learning, industry and integrity stand nowhere on safer or higher ground than in the walks of the law. In all free countries it is the avenue not only to wealth, but to political influence and distinction.”

**§ 50. The prohibitions of the Noblesse de la Robe.<sup>1</sup>**—A compendium of professional ethics is given in the prohibitions of the “Noblesse de la Robe,” an order of men in France in early times, whose only patent of nobility was admission on the roll of advocates, and from whose ranks were chosen the magistrates who, as members of the parliament of Paris, represented the feudal court and council of the ancient kings of France. Among many others of those prohibitions, and to which each one was bound, were the following:

“1. He was not to undertake just and unjust causes alike without distinction, nor maintain such as he undertook with trickery, fallacies, and misquotations of authorities.

“2. He was not in his pleadings to indulge in abuse of the opposite party or his counsel.

<sup>1</sup> Hortensius, *The Advocate*—Forsyth, p. 215.

“3. He was not to compromise the interests of his clients, by absence from court when the cause in which he was retained was called on.

“4. He was not to violate the respect due the court, by either improper expressions or unbecoming gestures.

“5. He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

“6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

“7. He was not to lead a dissipated life, or one contrary to the modesty and gravity of his calling.

“8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed.”

**§ 51. Those to whom the lawyer owes duties.**—Without discussing the duties a lawyer owes to society at large, and to his fellowmen, as does every citizen, we confine our attention to those due from him in his professional capacity. There are three classes to whom the lawyer is professionally bound in legal ethics: to the court, to his brethren of the bar, and to his client. These duties, treated in a somewhat general and, perhaps, cursory manner, with a few suggestions touching the lawyer’s choice and refusal of causes, and his professional compensation, form the subjects of the remaining sections of this chapter.

**§ 52. The lawyer’s duty to the court.**—The attorney is an officer of the court, and as such owes to it at all times, and under all circumstances, outward respect in word and action. However much he may be aggrieved by a supposed wrong done him or his client by the rulings of the court, his oath of office,

as well as his honor and professional standing, command him to show to the court the utmost respect. On occasion, fully warranted, he may present decided objections to the views expressed, or to the course taken by the court, but it must be done with every sign of outward respect. The lawyer should bear in mind that the dignified and honorable administration of the law demands the respect of the public, and that the bar should never do ought to diminish that public regard. The proper administration of justice is the chief defense of good government from the assaults of anarchy and of evil-minded men, and when its citizens have lost their respect for the judiciary the barriers are beginning to fall, and there is at once a serious public danger. None are more interested in the preservation of the dignity of the courts, and of the law, than the members of the legal profession, and last of all should their actions detract from that dignity, or take away any of the estimation due to the administrators of justice.

**§ 53. Improperly influencing the court or jury.—** The ethics of the profession imperatively forbid the lawyer from making any attempt to secretly influence the court. There may be those who seek private interviews to make *ex parte* statements of their causes, but they do so in violation of their oaths of office, and of every rule of honor. Nor would the lawyer of high moral tone ever permit his client to do anything, directly or indirectly, which would tend to improperly influence the court; otherwise, he becomes a *particeps criminis*, and must suffer in conscience and honor, if not at the bar of justice. All this applies, and with still greater force, to any at-

tempt to influence a juror outside the open trial. It goes without saying that a violation of this rule is a crime in law, as well as in the court of morals. "It would be an injury to the administration of practice not to declare that it is gross misbehavior for any person to speak with a juror, or for a juror to permit any person to speak with him, respecting the cause he is trying."<sup>1</sup> "This principle is native to the conscience, and will be apparent to all who consult the monitor in their own heart. The wrong is aggravated when the taint of personal interest mingles with it, as when committed by a party to the cause; but appears in the worst form when it is the act of attorneys or counsel, who are the sworn officers of the court, and whose duty it is to act as guardians of the fountains of justice, and who are false to their charge when they defile or taint those waters which they are pledged to keep pure and unpolluted. Such conduct in counsel is a gross breach of trust, for which a removal from the trust is but an inadequate punishment."<sup>2</sup>

**§ 54. To use no falsehood or deceit.**—The lawyer must never practice any deceit or imposition upon the court, nor should he in any form evade the truth. He who is guilty of this offense is not worthy to wear the robe of the profession. His biographer said: "Sir Matthew Hale abhorred those too common faults of misreciting witnesses, quoting precedents or books falsely, or asserting anything confidently

<sup>1</sup> *Blaine v. Chambers*, 1 S. & R. 169.

<sup>2</sup> *Ex parte Carver*, 1 Phila. R. 507.

by which ignorant jurors and weak judges are too often wrought upon."<sup>1</sup>

In some cases, in the heat of an argument, counsel may find it difficult to refrain from so coloring the evidence as to influence the minds of the jury. All fair arguments and inferences are perfectly legitimate, but when they extend to a misstatement of the evidence, and to a perversion of the truth, the advocate is guilty of a gross breach of professional ethics. It may be doubted, too, if such a course is generally productive of any successful results. If the jury detect the lawyer in a statement which they know to be false—and their memory of the proven facts is usually accurate—he at once falls in their esteem, and is likely to have weakened the effect of all his argument if the jury have cause to believe that he is not entirely trustworthy. So with the court; if counsel willfully misquote an authority, or interpolate words, or omit others, and the court discovers the deception, as it most likely will, the lawyer not only then fails to make his point, but must expect to be thereafter regarded with suspicion.

**§ 55. The lawyer's duty to his professional brethren.**—The lawyer should preserve honorable relations with his brethren of the bar. If, in his daily intercourse with them, he wins their confidence and regard he has taken a long stride toward success in his profession. To secure this respect his promises and engagements should be faithfully and punctually kept. At all times his word should be undoubted; if he be even suspected of unfaithfulness he has begun to lose

<sup>1</sup> Life of Lord Matthew Hale, Burnett, 72.

the esteem of his brethren. The attorney will find, in the long run, that the good opinion of the bar is of more value than what is commonly called public applause. The judgment of the bar as to the qualities of its members is given with deliberation, but, when delivered, is of great influence with the community. This judgment is based upon the ability and integrity of the lawyer, and when there is added to those qualities courtesy and a gentlemanly bearing, and all are crowned by evidence of his high honor, the verdict will be one known of all men, and productive of high professional fame.

**§ 56. The lawyer's success is promoted by the respect of the profession.**—The respect of the lawyer's fellow-practitioners is not only gained by his observance of ethical rules, but his success is often assured by their regard, and his practice is made much easier by their friendship. On this subject Chief Justice Sharswood said : "A very great part of a man's comfort, as well as of his success at the bar, depends upon his relations with his professional brethren. With them he is in daily necessary intercourse, and he must have their respect and confidence if he wishes to sail along in smooth waters. He can not be too particular in keeping faithfully and liberally every promise or engagement he may make with them. One whose perfect truthfulness is even suspected by his brethren at the bar has always an uneasy time of it. He will be constantly mortified by observing precautions taken with him which are not used with others. It is not only morally wrong but dangerous to mislead an opponent, or put him on a wrong scent in regard to the case. It would be going

too far to say that it is ever advisable to expose the weakness of a client's cause to an adversary, who may be unscrupulous in taking advantage of it; but it may be safely said, that he who sits down deliberately to plot a surprise upon his opponent, and which he knows can succeed only by its being a surprise, deserves to fall, and, in all probability will fall, into the trap which his own hands have laid. If he should succeed, he will have gained with his success, not the admiration and esteem, but the distrust and dislike of one of his associates as long as he lives. He should never, unnecessarily, have a personal difficulty with a professional brother. He should neither give nor provoke insult.

"There is one more caution to be given under this head. Let him shun most carefully the reputation of a sharp practitioner. Let him be liberal to the slips and oversights of his opponent wherever he can do so, and in plain cases not shelter himself behind the instructions of his client. The client has no right to require him to be illiberal,—and he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety."<sup>1</sup>

**§ 57. Friendships at the bar conducive to professional employment.**—If the beginner has the confidence and esteem of his fellow-lawyers he may expect to be asked to assist his seniors; while their regard, continued through life, will bring to his office no mean business from his juniors, when he has acquired a position among the leaders of the bar.

<sup>1</sup> Sharswood's Legal Ethics, 73.

Again, it is to be remembered that the judges are practically selected by the bar, and the esteem of his associates may, in time, cause the honorable and able lawyer to be considered by them as worthy of wearing the ermine. The choice of the bar usually meets with the approval of the ballots of their fellow-citizens, while the opposition of their associates generally results in the defeat of those who do not possess their entire respect.

**§ 58. The lawyer's duty to his client.**—To his client is due the lawyer's devoted fidelity. He who is honorably for his client, first, last and all the time, is sure to be the man who will be sought out for professional assistance, rather than the one who is not looked upon as absolutely trustworthy at all times, and under all circumstances. The slightest suspicion thrown upon the lawyer's absolute fidelity to his client will prove of incalculable harm to his professional career. He must faithfully preserve his client's secrets; an attorney will in no case be permitted to divulge any matter which has been committed to him in professional confidence; this is not his privilege, but the privilege of his client, and none other can waive it. He can not be too scrupulously honest in the care or management of his client's money or property; if the least shadow of doubt in this regard falls upon him he will suffer irreparable injury. He should treat his client's money as a sacred trust, and, if possible, never mingle it with his own funds. It is a golden motto "Never to let the sun go down on your client's money;" if possible, remit it to him as soon as

received. Promptness in this regard will earn the beginner a reputation of great value.

**§ 59. The lawyer is the keeper of his client's conscience.**—To some degree the lawyer is the custodian of his client's conscience, and should never permit him to do or say anything which is wrong *per se*. This particularly applies to the preparation of his client's affidavits, wherein the lawyer should be scrupulously punctilious. The temptation is sometimes strong to draw an affidavit stretching the truth, or, at least, the conscience of his client. To such a temptation he must never yield, but, rather, should seek to restrain his client from making oath to that which is not true in every particular. He who secures another to take a false oath is guilty of subornation of perjury, and the counsel who prepares an untruthful affidavit, knowing or having reason to suspect its falsity, treads the borderland of the crime, and certainly renders himself guilty in the forum of conscience.

To sum up the fidelity due from the lawyer to his client, it can be said that he owes him his entire devotion to his legal interests, exercised in an honorable and conscientious manner; warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability. These are the aims which alone should satisfy the upright and faithful advocate or counsel.

**§ 60. Choosing and refusing causes—The ethics of defending the guilty.**—At one time there was a much mooted question of the ethical right of a lawyer to defend one he either knew or believed to be guilty, and upon that question, *pro* and *con*, many pages

have been written.<sup>1</sup> The successful argument, however, was with Erskine and Lord Brougham, who showed that liberty was indeed gone if the lawyers were so become the judges that they must refuse to defend a criminal, having themselves prejudged his cause. No man is guilty until so proven in a court of justice, after a fair and impartial trial, and it is the right of the prisoner to have that impartial trial; which can only be had when he is defended by counsel. Without that legal presentation of his defense a criminal case would become a mockery, and the prisoner's conviction a gross injustice. In this connection it is to be remarked that the court has power to appoint counsel to defend a prisoner, and for such an appointment, as an officer of the court, he can not refuse his services.

**§ 61. The lawyer is not required to prosecute an unjust cause.**—So much for defending an accused, and, perhaps, guilty prisoner. Quite a different question is raised when it comes to a prosecution. Here, the lawyer is neither legally nor morally required to take part, as private counsel, in prosecuting those he knows or believes to be innocent. Nor should he ever be concerned in a civil cause where he is satisfied, after a thorough examination of the facts, or from the course of the trial, that his client desires to secure an unjust or improper advantage. Quintilian well said: “Nor should the advocate let any false shame prevent him from abandoning a cause to which he has engaged under an impression

<sup>1</sup> See Courvoisier's Case, Sharswood's Legal Ethics, Appendix No. 1; Littell's Living Age, Vol. 24, pp. 180, 230, 306; Hortensius, The Advocate, Chap. x.

that it was just, when he discovers in the course of the trial that it is dishonest.” By one of the edicts of Justinian it was ordered that, at the commencement of every trial, the advocates engaged in it should take a solemn oath, upon the holy Gospels, that they would exert themselves for their clients to the utmost in all they believed to be right and just, but they were not to uphold a cause that was villainous, or supported by falsehood; and if, in the progress of the trial, they discovered that a case of that kind had been entrusted to their care, they were to at once abandon it. The good Bishop of Lincoln, in an assize sermon addressed to the counsel on the circuit, well summed up the matter: “If thou comest hither as to thine harvest, to reap some fruit of thy long and expensful study in the laws, and to assist thy client and his cause with thy counsel, learning and eloquence, think not that because thou speakest for thy fee that therefore thy tongue is not thine own, but thou must speak what thy client will have thee speak, be it true or false; neither think, because thou hast the liberty of the court, and perhaps the favor of the judge, that therefore thy tongue is thine own, and thou mayest speak thy pleasure to the prejudice of the adversary’s person or cause.”<sup>1</sup>

**§ 62. Professional compensation—The honorarium.**—From the earliest time, and until within more modern days, it had been the custom to regard the services of the advocate as gratuitously rendered, and the reward—*honorarium*, as it was called—

<sup>1</sup> Hortensius, *The Advocate*, 377.

received merely as a debt of gratitude, not in payment of a legal obligation. The origin of the theory of gratuitous services was based upon the right of the weak to demand the help of the strong, the successor of protection to the oppressed. So, among the earlier Romans, the patron defended his client without fee or reward, as part of the general protection which he was bound to render by the nature of the tie between them. In the greater days of the Roman republic the advocate served his client, not for pecuniary reward, but to win public applause, and the suffrages of his fellow-citizens to elevate him to places of honor in the state. But when the empire took away the impulse to win public fame, by degrading the offices formerly held in high honor, for the first time the fees to the advocate began to be paid, and so continued to be required, in more or less degree, notwithstanding the enforcement, at times, of the very stringent provisions of the Cincian law forbidding such emoluments.

**§ 63. The right of the lawyer to compensation.—** The right of the advocate to payment for his services was urged by no less a champion than Quintilian, in the first century of the Christian era. He said, in his Institutes: “Nor do I see what fairer or more proper mode of getting money can be suggested, than by means of a most honorable profession, and from those to whom we have rendered the most important services, and who, if they give nothing in return, must have been unworthy of our exertions. And this is not only right but necessary, since these very exertions, and the time devoted to the affairs of others, prevent counsel from increas-

ing their fortunes by any other means. But moderation must be observed in this, and it is of the utmost consequence to observe from whom fees are received, and to what amount. For as to bargaining for fees, and taking advantage of the necessities of clients to extort money from them, this is a practice which none but the vilest will attempt; especially since an advocate who has good causes and respectable clients need not fear ingratitude. But if he meets with it, it is better that sin should lie at the door of his client than himself."

In more modern times, and particularly in our own country, the lawyer is deemed to be legally entitled to his professional compensation, and may recover his fees in an action at law; a legal right discussed at more length in the succeeding chapter. But the lawyers who retain much of the principle of the old *honorarium*, and, be it said to the credit of the profession, a large number do preserve that high standard, are loath to resort to legal process to enforce payment of their fees. Indeed, it is such a violation of a rule of professional ethics, that the lawyer should seek the aid of the law in this behalf only in the most extreme case. In England, the barrister, or counselor, can not maintain a suit for his fees, while an attorney can recover his costs only after their formal and legal taxation.

**§ 64. Retainers and contingent fees.**—The custom of the bar to receive a retainer is one which all its members should uphold with full vigor. That it is to the interest of the client, by insuring the whole energy of the lawyer, is well known to those who have had experience with litigation; and that it is

that to which the advocate is justly entitled, is proven both by custom, and every rule of professional ethics.

Contingent contracts for fees, while enforceable at law, and, in these days, partially sustained by usage, should generally be avoided as tending to lower professional prestige. While the lawyer's charges against the unsuccessful client may, very properly, be less than if his case is won, it must be remembered that he is entitled to compensation for his services, and that he transgresses a rule of high professional ethics if he bind himself to receive his reward only out of a verdict. Very frequently the lawyer is asked if he will accept a case on a contingency, and often he is divided in his mind between a desire to secure the business and a fear that he will transgress a rule of ethics; and herein lies the difficulty of solving the question.

**§ 65. Ethical rules governing contingent fees.—** Speaking personally, the writer believes these rules to be fair. If the client is a very poor person, and unable to pay any fees—imagine the case of a poor widow desiring to recover damages for the death of her husband, caused by the negligence of a railroad company—there is no good reason why the case should not be undertaken without any fee in advance, and upon an agreement that the compensation is to be paid only out of the verdict. The amount of such fee, to be paid out of the recovery, is the pinch of the question. It is clear that the higher it is the more it violates the ethical rule; and here the conscience of the lawyer must be his guide. If the client is in moderate circumstances, it would be proper to re-

quire him to pay a small retainer at the outset, and, at the end, a fee small, if defeated, and larger, if victorious. If, however, it be a client able to pay, why should he not begin with a retaining fee, measured by the case, and compensate the lawyer when it is decided? Rich men who desire their advocates to try their cases only on a contingency, are clients of the baser sort, and unhappy is the lawyer whose clientage is relegated to that class. For those unable to pay, the lawyer's services should be as ready as they were in the days of the Roman republic; but as to clients of financial ability there is no reason why the lawyer is not entitled to full compensation. Certainly, taking a cause from such a client only on the basis of a contingent fee is a breach of professional ethics. On no account, and under no circumstances, should the lawyer ever agree to personally defray the expenses of an action; such as costs, witness fees, etc. Champerty is a misdemeanor at common law and, in some states, is made so by statute. Professionally, it is a felony.

**§ 66. Compensation should be commensurate with the services rendered.**—The lawyer's charges should be an index to his care for his client's interests. He ought not to cheapen his services, but should make a compensatory charge, and will not raise himself in his client's opinion by naming a smaller fee than that to which he is justly entitled. He may thus lose clients of the penurious sort; still, in the end, he will have established his clientage on a firm and enduring basis if his clients learn that he expects compensation for his services commensurate with the labors he has performed in their behalf. It goes

without saying that he should avoid anything like extortion, but he should not fear to ask such an amount as he honestly feels himself entitled to receive. If his bar has a fee bill—an agreement as to a minimum of fees—he should neither violate its terms by bargaining for lesser amounts than are therein named, nor bid against his brethren of the bar, nor have to do with would-be clients who ask him to take less than others have offered to charge for the same work.

It is advisable for the lawyer to keep an accurate account of the charges for his professional services, itemizing them so far as practicable, and rendering his bills before the matters in which his services have been employed have grown stale. The American lawyers would profit no little, and much better satisfy their clients, if professional bills could be itemized as minutely as those of the English attorneys and solicitors. This does not require that every detail of work should be priced; only that a particular statement of all that he has done in a given case, or matter, will convince the client of the fairness of the total charge, and enable the attorney to decide what that charge should be.

## CHAPTER VI.

### THE LEGAL RIGHTS, DUTIES, PRIVILEGES AND RESPONSIBILITIES OF THE LAWYER.

- § 67. The lawyer's official titles.
- 68. The status of the lawyer, and his admission to practice.
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- 74. The lawyer's responsibility to his client.
- 75. The lawyer's right to receive compensation.
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§ 67. **The lawyer's official titles.**—It is proposed to briefly consider the status of the lawyer ; the jurisdiction of the courts over him ; his rights and privileges ; and his duties and responsibilities. The lawyer is known by various titles. In England, the barrister is a counselor admitted to plead at the bar ; an attorney, an officer who practices in courts of common law ; a solicitor, in courts of equity ; and proctors, in courts of admiralty, and in the ecclesiastical courts. In the United States, the lawyer is known as an attorney and counselor at law, both titles being preserved in the Supreme Court of the United States, where the admission is both as attorney and counselor,—the former being supposed to

carry on the practical and formal parts of a suit, the latter, to conduct its trial. In some of the states, *e. g.* Pennsylvania, the lawyer conducting an equity cause styles himself a solicitor. Generally, the title is simply an attorney at law, as covering all the employment of the lawyer, and, under that name, it is proposed to consider the law as applicable to the members of the legal profession.

**§ 68. The status of the lawyer, and his admission to practice.**—An attorney at law is an officer of a court of justice, and is also one who is put in the place, stead, or turn of another to manage his matters of law.<sup>1</sup> The rules of the Supreme Court of the United States require, for the admission of attorneys or counselors, that they shall have been such for three years past in the supreme courts of the states to which they respectively belong; that their private and professional character shall appear to be fair; that they shall take an oath to demean themselves as such attorney and counselor uprightly, and according to law; and that they will support the constitution of the United States. The test oath, prescribed by the amended rule of March, 1865, in conformity to the act of congress of January 24, 1865, that the applicant has never borne arms against the United States, etc., is no longer required; the act of 1865, so far as it relates to the admission to the bar of the Supreme Court of the United States, having been declared to be unconstitutional and void.<sup>2</sup>

<sup>1</sup> *Bouvier Law Dict.*, 167; *Sharswood's Blackstone*, iii, 25; *Ex parte Garland*, 4 Wall. 333.

<sup>2</sup> *Ex parte Garland*, 4 Wall. 333.

In the several states the rules regulating the admission of attorneys somewhat differ; but in all it is required that the applicant must be twenty-one years of age; that he shall pass the required examination; and take an oath to support the federal and state constitutions. The essence of the right to exercise the office of an attorney at law is a license of some kind, granted according to the *lex fori*. The admission being a judicial and not a ministerial act is not the subject of a mandamus.<sup>1</sup> While it is the general practice of the courts in the several states, *ex gratia*, to permit members of the bar of other states to appear as counsel in the trial or argument of causes, such courtesy would not extend to their full admission to the courts without compliance with all the requirements of general admission, chief among which are residence and examination.<sup>2</sup>

**§ 69. The jurisdiction of the court over an attorney—Suspension, disbarment and attachment.**—As an officer of the court, and to preserve its dignity, the attorney at law is subject to the control of the court. He may be prevented from doing certain acts; he may be compelled to do others by its orders and decrees; he may be punished by attachment; he is subject to be suspended from practice; and he may be disbarred for proper cause. It is essential to the jurisdiction of the court in these matters that the acts upon which the court moves must relate to, or affect, the official character of the attorney. Over his conduct as a private citizen, and not in connection with his office as an attorney, the court does not possess

<sup>1</sup> Petition of Splane, 123 Pa. St. Rep. 527.

<sup>2</sup> *In re Mosness*, 39 Wis. 509.

this summary jurisdiction.<sup>1</sup> But where the attorney has been convicted of a crime, although not in his official character, he is subject to disbarment. In the leading case of *In re Wall*, 107 U. S. 265, where many of the authorities are reviewed, it was held that it is not an inflexible rule that disbarment for such an offense must await conviction, and that there are cases, of which that was one, where, after indictment, and before conviction, the court may exercise its summary jurisdiction. The vigorous dissenting opinion of Mr. Justice Field in this case is worthy of careful reading.

An attorney is subject to disbarment or suspension from practice for any matter showing his unfitness to practice in the courts, for breach of his oath of fidelity to the court, or for gross violation of the confidence of his client. He is entitled to notice of the proceedings, and to a proper trial. The power to thus deprive him of his office should be exercised with great caution and discretion ; the proceedings and judgment being subject to review by the appellate courts ; by mandamus, to restore him, or by certiorari, or appeal, the practice in this matter not being uniform.<sup>2</sup>

<sup>1</sup> *Ex parte* S. & H., 95 Pa. St. Rep. 220; *In re Aitkin*, 4 Barn. & A. 47; *People v. Allison*, 68 Ill. 151; *Anon.*, 2 Halst. (N. J.) 162; *State v. Forman*, 3 Mo. 412; *State v. Chapman*, 11 Ohio 430; *Baker v. Com.*, 10 Bush (Ky.) 592.

<sup>2</sup> For a review of the causes of suspension or disbarment, and practice therein, see note to *State v. Kirk*, 95 Am. Dec. 333-340; note to Delano's Case, 42 Am. Rep. 557; note to *Burns v. Allen*, 2 Am. St. Rep. 847-862; note to *In re Philbrook*, 45 Am. St. Rep. 71-86; 1 Am. & Eng. Encyc. Law, title, " Attorney and Client"; Weeks on Attorneys.

In addition to the power of suspension and disbarment, the courts have summary jurisdiction over attorneys, punishing by attachment, viz.: to compel them to perform their undertakings, to deliver up documents, to payment of money and costs, to answer affidavits, for contempt of court, to prevent their disclosure of privileged communications, to stay unauthorized proceedings begun by them and payment of costs therein, and to compel them to maintain good faith with their clients.<sup>1</sup>

**§ 70. The lawyer's privileges and disabilities.—** An attorney is privileged from arrest while in attendance in court upon professional business, while going so to attend and while returning after such attendance.<sup>2</sup> This privilege is not universal, but is general in most of the states. His privilege from service of summons in a civil case is not so strongly upheld, and but few cases can be found where it has been extended. It has been allowed where the attorney of another bar is specially trying a case in the court where he is sued, and, also, when he is engaged in the argument of a cause in appellate courts, or in the trial of an action in the federal courts, or in taking depositions in such a court. No case can be found where a resident attorney is

<sup>1</sup> Iverson *v.* Corington, 1 Barn. & Cress. 160; Burrel *v.* Jones, 3 Barn. & Ald. 47; In the Matter of H., 87 N. Y. 521; *In re Bunting*, 2 Ad. & Ellis 467; Cushman *v.* Brown, 6 Paige (N. Y.) 539; Earl Cholmondeley *v.* Lord Clinton, 19 Vesey Jr. 261; Thatcher *v.* D'Aguilar, 11 Exch. Rep. 436; Bohenan *v.* Peterson, 9 Wendell 503.

<sup>2</sup> Attorney-General *v.* Skinners, 8 Simons 377; Castle's Case, 16 Vesey Jr. 412; Ogden *v.* Hughes, 5 N. J. Law 718; Gibbs *v.* Loomis, 10 Johns. 463; Secor *v.* Bell, 18 Johns. 52.

free from service of civil process from his own court, even if engaged in the trial of a cause when served.<sup>1</sup>

The lawyer is privileged in saying anything in the trial of a cause pertinent to the issue. He is not liable for saying or writing anything, however false or defamatory may be the words, provided the matter was material to the issue or inquiry before the court. The important elements in the facts which entitle him to this protection are that the words were spoken or written in the course of judicial proceedings, and were relevant and pertinent to the cause. To these questions all the cases of slander or libel against an attorney for words spoken or written in the trial or pleadings of a cause have been confined.<sup>2</sup>

The disabilities of a lawyer include his acting in the case in any capacity inconsistent with his professional relation to his client. In England, and in many of the states, entering himself as bail in a case in which he is concerned, acting on both sides in the same action, even if at different trials, and, in New

<sup>1</sup> Holmes *v.* Nelson, 1 Phila. 217; Young *v.* Armstrong, 13 Weekly Notes (Pa.) 313; Bank *v.* McCandless, 6 County Court Rep. (Pa.) 327.

<sup>2</sup> Hoar *v.* Wood, 3 Metcalf 193; Maulsby *v.* Reifsnyder, 6 Atl. Rep. 505 (69 Md.); Stackpole *v.* Hennen, 17 Am. Dec. 187, and note; Hastings *v.* Lusk, 22 Wendell 410; Garr *v.* Selden, 4 N. Y. 91; Hollis *v.* Meux, 69 Cal. 625; Brook *v.* Montague, Cro. Jac. 90; Hodgson *v.* Scarlett, 1 Barn. & Ald. 232; Mackey *v.* Ford, 5 Hurl. & Norm. 792; Flint *v.* Pike, 4 Barn. & Cress. 473; Munster *v.* Lamb, L. R. 11 Q. B. D. 588; Newell on Defamation, etc., 429-445; Townsend on Slander and Libel, § 225.

York, purchasing a chose in action for the purpose of bringing suit thereon, are forbidden.<sup>1</sup>

**§ 71. Professional communications.**—At common law, as well as by statute, all communications made by the client to his attorney in the course of his employment are privileged ; even if the attorney is not retained, and whether or not the communication is important, or has been given without the pledge of secrecy. The privilege is that of the client and not that of the attorney, and by the client alone can it be waived, and then the waiver must be distinct, and without condition ; and this prohibition prevails against the attorney even after he has been disbarred. The communication need not, necessarily, relate to litigation, but includes all the facts given by the client in the course of his business relations with his attorney. And the rule extends equally to communications of the client made to the attorney through a third person, and also forbids those representing the attorney in communication with the client—such as his clerk, or a stenographer—from testifying to a knowledge of facts thus acquired. Equal protection is given to documents or letters of the client in the possession of the attorney ; although documents which the client can be required to produce at the trial can also be demanded of his counsel.

While this rule is upheld with great vigor, there are some exceptions. Thus, communications where the relation of attorney and client do not exist are

<sup>1</sup> Weeks on Attorneys, §§ 120-122; 1 Yonge & Jervis, 367, note; 1 Taunton Rep. 164; 1 Tidd's Pr. 230; Coster v. Watson, 15 Johns. 535; Craig v. Scott, 1 Wend. 35; People v. Spencer, 61 Cal. 128; People v. Coalbridge, 3 Wend. 120.

not privileged. So, of those made to a mutual attorney, to be forwarded to the other client, or statements made by the client to other parties, or by them to him in the hearing of the attorney. Nor, where the communication is made for the purpose of being communicated to the adverse party, or is made for an unlawful purpose, is it privileged. The attorney may, also, be called to prove an agreement or compromise made by the parties litigant, and where the attorney has been called by his client as a witness to his communications, he is subject to cross-examination thereon by the other party. Testamentary communications are not privileged, nor any communications when the attorney defends an action brought against him by his client for disobeying instructions contained in such communications.<sup>1</sup>

**§ 72. The authority of the attorney.**—By virtue of his employment the attorney is authorized to do in behalf of his client, in or out of court, all such acts as are necessary or incidental to the prosecution or management of his suit, and which affect the remedy only, and not the cause of action.<sup>2</sup> But he may not, without special authority, accept service of the original process, for until service the jurisdiction of the court is not established over the client, and only when that jurisdiction has been secured does the attorney's professional relation with the case begin.<sup>3</sup> Nor can he bind his client by an agreement not to appeal, or by a compromise; and can only discharge the debtor

<sup>1</sup> The cases are collated in the American and English Encyc. of Law, title, "Privileged Communications."

<sup>2</sup> Moulton v. Bowker, 115 Mass. 36, per Gray, C. J.

<sup>3</sup> 1 Wait's Actions and Def., 439.

by a full payment in money. Neither has he the power to assign the claim or judgment, or release an indorser on a note. After final judgment his general authority ceases, except to receive satisfaction.<sup>1</sup>

While an appearance by attorney gives jurisdiction as effectually as an actual service of the summons, the rule, both in the English and American courts, seems to be that such an appearance is not conclusively binding on the defendant, unless the attorney is so directed to appear, or is so employed by the person for whom he appears as to impliedly give him that power; but want of such authority should be specially pleaded, and can not be questioned at the instance of a stranger to the record.<sup>2</sup>

**§ 73. The liabilities of an attorney at law to third parties.**—To third parties he is liable for costs incurred through his own misbehavior, ignorance or gross negligence;<sup>3</sup> and, in some of the states, for costs of sheriffs, clerks, and other officials, on writs directed by him to such officers.<sup>4</sup> He is also liable for maliciously procuring an arrest, or an order of attachment, upon a claim he knows to be unfounded; proof

<sup>1</sup> *Bates v. Voorhis*, 20 N. Y. 325; *Whitehall v. Keller*, 100 Pa. St. Rep. 105; *Holker v. Parker*, 7 Cranch (U. S.) 436; *Granger v. Batchelder*, 54 Vt. 248 (s. c. 41 Am. Rep. 846, and note); *Weeks on Attys.*, § 238.

<sup>2</sup> *Weeks on Attys.*, § 198; *Hill v. Mendenhall*. 21 Wall. 453; *Shelton v. Tiffin*, 6 How. 163, and note in 12 L. Ed. 163.

<sup>3</sup> *Weeks on Attys.*, § 28.

<sup>4</sup> *Heath v. Bates*, 49 Conn. 342; *Tilton v. Wright*, 74 Maine (s. c. 43 Am. Rep. 578, and note); *Towle v. Hatch*, 43 N. H. 270; *Robbins v. Hill*, 12 Pick. 569; *Jones v. Savage*, 10 Wend. 621.

of malice being necessary to establish his liability in such cases.<sup>1</sup>

**§ 74. The lawyer's responsibility to his client.—** The legal responsibility of the lawyer to his client may be stated, generally, to be that he is liable for the want of ordinary care, and is bound to exercise reasonable diligence and skill, the skill required having reference to the character of the business which he undertakes to do. He is responsible for gross negligence; for neglect of his duties; and of the proper commands and directions of his client; or if he loses his client's deeds or valuable papers and securities intrusted to his care. His legal learning must extend to the ordinary and settled rules of pleading and practice; to the statutes and published decisions of his own state; and to the rules of law well and clearly defined, both in text-books and reports, and which have existed long enough to justify the belief that they are well known to the profession. In short, the attorney impliedly represents that he possesses the skill, and will exhibit the diligence, ordinarily employed by well informed members of his profession; but he is not liable for any error of judgment upon points of new occurrence, or of nice or doubtful construction.<sup>2</sup>

<sup>1</sup> *Stockley v. Hornbridge*, 8 Car. & P. 16; *Stowell v. Champion*, 6 Ad. & E. 407; *Hunt v. Printup*, 28 Ga. 297; *Lynch v. Com.*, 16 S. & R. (Pa.) 370.

<sup>2</sup> The leading cases on the question of the liability of an attorney to his client are these:

*England*—*Pitt v. Yalden*, 4 Burr. 2060; *Godfrey v. Dalton*, 6 Bing. 460, 467; *Godefrey v. Jay*, 7 Bing. 413; *Montrion v. Jeffreys*, 2 Car. & P. 113; *Kemp v. Burt*, 4 Barn. & Adol. 424; *Reece v. Rigby*, 4 Barn. & Ald. 202; *Laidler v. Elliott*, 3 Barn. & C. 738;

**§ 75. The lawyer's right to receive compensation.** —In England, the fees of attorneys and solicitors are regulated by statute and rules of court. The

*Lanpher v. Phipos*, 8 Car. & P. 475; *Swinfen v. Lord Chelmsford*, 5 Hurl. & Norm. 890; *Hart v. Frame*, 6 Cl. & Fin. 192; *Purvis v. Landell*, 12 Cl. & Fin. 91; *Chapman v. Chapman*, L. R. 9 Eq. Cases 276.

*United States Courts*—*Wilcox v. Plumer*, 4 Peters 172; *Marsh v. Whitman*, 21 Wall. 178; *Natl. Savings Bank v. Ward*, 10 Otto 195; *Suydam v. Vance*, 2 McLean 99 (s. c. 23 Fed. Cases 477); *Spangler v. Sellers*, 5 Fed. Rep. 882; *Alhauser v. Butler*, 57 Fed. Rep. 121.

*Alabama*—*Mardis v. Shackleford*, 4 Ala. 494; *Lewis v. Peck*, 10 Ala. 142; *Goodman v. Walker*, 30 Ala. 482; *Stubbs v. Breene*, 37 Ala. 627.

*Arkansas*—*Pennington v. Yell*, 6 Eng. 212; *Walker v. Scott*, 8 Eng. 644; *Sevier v. Holliday*, 2 Ark. 512; *Palmer v. Ashley*, 3 Ark. 75.

*California*—*Hastings v. Halleck*, 13 Cal. 203; *Gambert v. Hart*, 44 Cal. 542; *Drais v. Hogan*, 50 Cal. 121.

*Connecticut*—*Brockett v. Norton*, 4 Conn. 524.

*Georgia*—*Nisbet v. Lawson*, 1 Ga. 275; *Cox v. Sullivan*, 7 Ga. 144; *O'Barr v. Alexander*, 37 Ga. 201.

*Illinois*—*Stevens v. Walker*, 55 Ill. 151; *Walsh v. Shumway*, 55 Ill. 471; *Chase v. Heaney*, 70 Ill. 268.

*Indiana*—*Reilly v. Cavanaugh*, 29 Ind. 435; *Walpole v. Carlisle*, 32 Ind. 415; *Skillen v. Wallace*, 36 Ind. 319; *Hillegas v. Bender*, 79 Ind. 225; *U. S. Mtge. Co. v. Henderson*, 111 Ind. 24; *Citizens' Assn. v. Friedly*, 123 Ind. 320.

*Kansas*—*Cummins v. Heals*, 24 Kan. 600.

*Louisiana*—*King v. Fourchey*, 47 La. Ann. 354.

*Maine*—*Smallwood v. Norton*, 20 Me. 83; *Wilson v. Russ*, 20 Me. 83; *Dorrance v. Hutchinson*, 22 Me. 357.

*Massachusetts*—*Gilbert v. Williams*, 8 Mass. 57; *Dearborn v. Dearborn*, 15 Mass. 316; *Varnum v. Martin*, 15 Pick. 450; *Wilson v. Coffin*, 2 Cush. 316; *Caverly v. McOwen*, 123 Mass. 574.

*Michigan*—*Egglesston v. Boardman*, 37 Mich. 14; *Babbit v. Bumpus*, 73 Mich. 331.

*Mississippi*—*Fitch v. Scott*, 3 How. 86 (s. c. 34 Am. Dec. 89, 96,

barrister's fee is regarded as an *honorarium*; it is not the subject of a contract and an action will not lie to recover it.<sup>1</sup> While the English rule at one time prevailed in some of the states (*e. g.*, Pennsylvania and New Jersey) it is now universally the law in this country that an attorney at law may recover for his professional services, whether rendered in the trial of a case, or otherwise. However unfortunate the

and valuable note); *Grason v. Wilkinson*, 13 Miss. 268; *Wilkinson v. Griswold*, 20 Miss. 699; *Coopwood v. Baldwin*, 25 Miss. 268.

*New Hampshire*—*Hill v. Barney*, 18 N. H. 607.

*New Jersey*—*Griggs v. Drake*, 21 N. J. Law 169, 173; *Fenaille v. Couder*, 44 N. J. Law 286; *Brown v. Bulkley*, 14 N. J. Eq. 451; *Nancrede v. Voorhis*, 32 N. J. Eq. 524.

*New York*—*Smedes v. Elmendorf*, 3 Johns. 185; *Hopping v. Quinn*, 12 Wend. 517, 519; *Quinn v. VanPelt*, 56 N. Y. 417; *Bowman v. Talman*, 27 How. Pr. 212.

*North Carolina*—*Crosbie v. Murphy*, 8 Ired. C. L. 301.

*Ohio*—*Harter v. Morris*, 18 Ohio 492.

*Pennsylvania*—*Lynch v. Com.*, 16 S. & R. 368; *McWilliams v. Hopkins*, 4 Rawle 382; *Riddle v. Poorman*, 3 P. & W. 224; *Cox v. Livingstone*, 2 W. & S. 103; *Wingate v. Bank*, 10 Pa. 108; *Krause v. Dorance*, 10 Pa. 462; *Braine v. Spalding*, 52 Pa. 247; *Watson v. Muirhead*, 57 Pa. 161; *Rhines v. Evans*, 66 Pa. 192; *Bradstreet v. Everson*, 72 Pa. 124; *Morgan v. Tener*, 83 Pa. 305; *Wickersham v. Lee*, 83 Pa. 416; *Moore v. Juvenal*, 92 Pa. 484; *Siner v. Stearne*, 155 Pa. 62; *Waln v. Beaver*, 161 Pa. 605.

*Rhode Island*—*Holmes v. Peck*, 1 R. I. 242.

*Texas*—*Morrell v. Graham*, 27 Tex. 646; *Oldham v. Sparks*, 28 Tex. 425.

*Virginia*—*Roots v. Stone*, 2 Leigh 650.

*Vermont*—*Crooker v. Hutchinson*, 1 Vt. 73.

*Text-Books*—Weeks on Attys., §§ 284–289; Chitty on Contracts (10 Am. Ed.) 607, 608; Shearman and Redfield on Negligence 221; 2 Sedgwick on Damages, §§ 814, 831.

<sup>1</sup> *Kennedy v. Brown*, 13 Common Bench N. S. 677. The elaborate argument of Mr. Kennedy (pp. 683–716) reviews the history of the *honorarium* and is well worth reading, as is the whole case.

lawyer may be who must thus enforce his fee, and how far such an action may remove him from an observance of strict professional ethics, it is clear that he is entitled to recover for the services he may render his client. Where there is not an express contract, he may recover reasonable compensation upon a *quantum meruit*. He is permitted to enter into a contract with his client providing for the amount of his fee, and such contract may extend to cover a share of the amount recovered; provided it be neither oppressive nor champertous. To render such a contract void for champerty, it now seems to be held that the agreement must extend to carrying on the case at the expense of the attorney.<sup>1</sup> But an agreement for a fee contingent upon the successful interference with the due enforcement of the law is void as contrary to public policy. Thus, it has been held that a contract whereby an attorney at law undertakes, for a contingent fee, to procure a settlement of a criminal charge, can not be enforced.<sup>2</sup> So, also, where a client has a claim against the government, to enforce which a legislative mandate is required, and his agreement with his attorney is for the payment of a contingent percentage of the amount received, and the principal service contemplated and actually performed by the attorney is in the procurement of the necessary legislation, the contract is void as against public policy.<sup>3</sup> Where, however, the special agreement is void for champerty, the attorney may recover on a *quantum meruit*.<sup>4</sup>

<sup>1</sup> *Bowman v. Phillips*, 13 Am. St. Rep. 297-300, note.

<sup>2</sup> *Ormerod v. Dearman*, 100 Pa. St. Rep. 561.

<sup>3</sup> *Spalding v. Emery*, 149 Pa. St. Rep. 375.

<sup>4</sup> *Weeks on Attys.*, § 345.

**§ 76. Attorney's retaining lien.**—Attorneys have a general lien upon all the papers and documents of their clients in their possession, not only for all costs and charges due them in the particular cause to which such papers and documents relate, but, also, for costs and charges due to them for other professional business, and for their employment in other matters.<sup>1</sup> The essentials of the lien are that the debt must be due the attorney in his professional employment, and that the papers came into his possession in his professional character. The lien of the attorney also extends to funds in his hands for payment of his fees and disbursements in the cause in which such moneys are received, as also for services rendered in other matters.<sup>2</sup>

**§ 77. Attorney's charging lien.**—The attorney has a special, or charging, lien upon funds in court recovered through his labors. The concensus of the authorities is to the effect that the lien does not attach until judgment. The courts have differed in their decisions as to whether the lien covers fees and disbursements, as well as costs, and the question as to how far the client may dispose of the judgment or recovery, to defeat the claim of the attorney, has been

<sup>1</sup> Story on Agency, § 383; Weeks on Attys., § 371; *Ex parte* Sterling, 16 Ves. 258; *Ex parte* Pemberton, 18 Ves. 282; St. John v. Diefendorf, 12 Wend. 261; Hooper v. Welch, 43 Vt. 171; Du Bois's Appeal, 38 Pa. 231; McKelvy's Appeal, 108 Pa. St. Rep. 615; Dennett v. Cutts, 11 N. H. 163; Howard v. Osceola, 22 Wis. 453; Stewart v. Flowers, 44 Miss. 513; Casey v. March, 30 Texas 180.

<sup>2</sup> *In re* Pascall, 10 Wall. 483; Hurlburt v. Bingham, 56 Vt. 368; *In re* Knapp, 85 N. Y. 284; Balsbaugh v. Frazer, 19 Pa. St. Rep. 95; McKelvy's Appeal, 108 Pa. St. Rep. 615.

variously adjudicated. In England, attorneys and solicitors have been given their lien upon the money or property recovered for their costs and disbursements by very strong decisions, and such is now the law by statute, 23 and 24 Vict. C. 127. In the federal, and in some of the state courts, this lien is held to extend both to costs and advancements and to fees for services rendered. In others, it has not been extended beyond costs and disbursements, while, in still others, it is regulated by statute.<sup>1</sup>

<sup>1</sup> See cases collated in notes to *Andrews v. Morse*, 31 Am. Dec. 752, and *State of Texas v. White*, 77 U. S. 483, L. Ed. Book 19, pp. 992, 994; also see 1 Am. and Eng. Encyc. of Law, 970-973.

## CHAPTER VII.

### PRACTICAL HINTS TO THE BEGINNER.

- § 78. Knowledge acquired by experience.
- 79. Economize time.
- 80. Be accurate.
- 81. Be cool and self-possessed.
- 82. Maintain a thorough system.
- 83. Cultivate a courteous and gentlemanly manner.
- 84. Avoid speculations.
- 85. Promptly attend to your correspondence.
- 86. Cultivate the acquaintance of other lawyers.
- 87. Avoid politics.
- 88. Professor Washburn's advice.

§ 78. **Knowledge acquired by experience.**—It is the purpose of this chapter to add a few practical suggestions, proving, it is hoped, of some value to the young lawyer. Many of them are gleaned from the experience of active practitioners, and all, it is believed, are rules worthy of observance by every lawyer. No profession gives its members the profit of experience in a more practical and positive form than that of the law. Such experiences are often sad ones, and many a lawyer has frequent cause for regret that he has been obliged to gain them in so stern a school and from so hard a master. The errors into which the novitiate sometimes falls may lead to disastrous results, although his motives and intentions may have been of the best. As Chief Justice Sharswood said, in speaking of the practice.

of the law, "there are pitfalls and mantraps at every step," and the youthful lawyer has need of the greatest caution to avoid them. It is the hope of the writer that he may, in some small degree, at least, hold out a helping hand to his younger brother, and assist in advancing him in the journey of his professional life. He would not assume to himself the embodiment of the virtues which he sets forth; indeed, his own experiences show him how often he himself has been derelict in following some of the directions which he now has to suggest. However, it is his hope that these hints may aid some others in their future course, and that his more experienced brethren of the bar will join him in agreeing that the suggestions made are worthy the attention of the youthful and inexperienced attorney.

**§ 79. Economize time.**—Time is the lawyer's capital, and he can not afford to waste it, but should let every moment of his working hours count for something. The lawyer must strictly guard against this loss of time, for from it flow habits of sloth and negligence, among the greatest enemies of the profession. A lawyer's business is of such a varied character, and so widely differing in its many kinds, that he can not always work continuously at one matter. Interruptions must necessarily come to him, tending to lax habits and to want of close and continuous labor. If the beginner will be orderly in the arrangement of his business hours, and consider each one wasted as deferring so much longer the attainment of his professional success, he will find that he has mastered the important rule of economizing time, and

that it is one returning him rewards worthy the sacrifice.

**§ 80. Be accurate.**—This accomplishment can not be overrated. In all the work of the profession it should be a shining light, toward which the lawyer's eyes are constantly turned. Last of all will his client, or the public, forgive his error of inaccuracy. Many an important legal document has been robbed of its intended effect, and many a cause irretrievably lost, through some clearly inexcusable want of accuracy. The reports teem with such cases. While, under the modern practice, the statutes of amendments have been liberally extended, and mistakes in pleadings can now be corrected at almost any stage of the proceedings, it must be remembered that they are usually permitted only at the cost of the party applying for them. The mortification which the attorney must suffer, when he remembers that his own want of care is the cause of such expense and delay to his client, would prove a bitter, but, probably, wholesome lesson. There are mistakes made by a lawyer which amendments can not cure nor the courts relieve a client from their consequences. Such are errors in preparing a deed, a will or a contract; or in searching a title; or in the preparation, or trial, of a cause. When these errors are the result of a want of accuracy or care on the part of an attorney, how can he expect his client to again engage his services or recommend him to others? If his mistake comes to the knowledge of the public he must certainly suffer in reputation, and may be long in regaining a position at the bar lost through his own carelessness.

**§ 81. Be cool and self-possessed.**—One working in a hurry must have his wits about him, or he is likely to make mistakes an alert opponent is sure to detect. The lawyer must frequently work quickly, and is often compelled to do things in haste, but he must keep possession of his nerve, and, under all circumstances, remain cool and self-possessed. This is a difficult lesson to be learned, but its accomplishment is of inestimable benefit to the lawyer. He most needs this quality in the trial of a cause, for the court-room is an exciting spot to the lawyer, humdrum as it may seem to the mere spectator. In a closely contested legal battle the tide of victory often ebbs and flows, and the advocate should neither be so exultant at the one, or disheartened at the other, as to lose his equilibrium. Many times a witness fails to respond in his evidence as was expected of him ; often the rulings of the court are adverse when the contrary was looked for; and there are cases where a fine theory upon which counsel has built his case goes by the board. In all these instances, particularly the last, the advocate needs to summon to his relief his utmost self-possession and his strongest nerve. His excitement now may lose him his cause, while if he retains command of his powers he may discern an avenue of escape, or a loop-hole through which he may see the defeat of his enemy. Of a famous jury lawyer, now a distinguished jurist, one of his contemporaries well said : “In the trial of a law suit he was like an opossum slung through a tree ; if he lost his hold in one foot he caught on by the other, and if he was forced off all his feet he swung by his tail.” The simile was homely, but none the

less true, and was said of a lawyer than whom few have been more difficult to beat in a law suit.

**§ 82. Maintain a thorough system.**—The lawyer can not have wiser rules for his guidance than those commanding him to be systematic and orderly in his profession. A thorough system, rigidly adhered to, will result in the greatest benefit. The attorney needs it in the care of his office and client's business, papers and affairs; it is of the utmost value in the preparation of a cause, and in framing the brief; while at trial the advocate who is without a system, or theory, as it is often called, is as badly off as a mariner without chart or compass. The lawyer of systematic and orderly mind and habits will accomplish more and better work, and in a shorter period of time, than can two others without this valuable accomplishment. The attorney at law should always have his legal affairs in such good order and so well arranged that his sudden death will not subject his clients to injury or delay. The lawyer is a custodian of valuable papers which, in after years, may prove of great assistance to others. He should have them so arranged and filed that not only can he readily put his hand on them, but that, after his death, others can find them. The writer has in mind a very important cause where papers of value—so valuable indeed that a great sum of money depended upon them—were left with one of the counsel in the case, but, after his decease, his clients were absolutely unable to find them, even after a most diligent search. Although some of the papers were partially supplied by secondary evidence, a

large sum was irretrievably lost by the lawyer's carelessness.

**§ 83. Cultivate a courteous and gentlemanly manner.**—It has been well said that success in life depends very much upon the number to whom one can make himself agreeable. This is peculiarly applicable to the lawyer, and especially to the beginner; for among his friends he must expect to find his first clients. The young man who has the faculty of winning and keeping friends will soon find himself on the road to professional success. If his friends find him to be worthy their confidence he can expect their active assistance in bringing him other clients and professional business. Without friends, or the capability of making them, the beginner at the bar is sadly handicapped. Elsewhere reference is again made to the subject,<sup>1</sup> but it is well to also here state that the lawyer should refrain from abuse and browbeating of witnesses and opposing parties, not only arousing the sympathies of the jury, but, also, as likely to turn those thus abused into decided enemies. The successful lawyer can not expect to be without enemies—the very nature of the profession assures them—but he should not make them by indulging in vilification and vituperation at trial. The lawyer should never forget that he is bound to sustain the character of a gentleman, and that any exhibition of coarseness, vulgarity, undue forwardness, or lack of dignity, is sure to injure his professional reputation. A considerate respectfulness of demeanor, far removed from anything like pertness,

<sup>1</sup> Part 4, Trial Causes, Chapter XXIX, §§ 309, 310, 312.

bantering, jocular familiarities, and attempts to be sharp and smart, will characterize the successful lawyer. He needs to keep a constant watch upon his temper, for no profession or calling in life is so likely to sour the disposition, or cause a growth of irritability, as that of the law. A calm and unruffled manner, even in the face of the most exasperating trials, or in the hour of the most mortifying defeat, marks the lawyer who is in command of himself, and shows him to be one who has mastered the cardinal virtue of self-control.

**§ 84. Avoid speculations.**—Of all men, the lawyer should be the most conservative in his personal business affairs; his conservatism in his own concerns recommending him as an adviser and guide for others, as clients will avoid the speculating lawyer, believing him likely to mislead them in their affairs. The attorney is frequently called upon to advise those who seek cautious and safe investments, and if he be regarded as a speculator and taking chances with his own property, how can he be considered to be a safe counselor? Again, the lawyer is apt to be weaned from his profession if he indulges in schemes of rapid money-making. Every bar, in reviewing its history, can point to those of its members who have thus “jumped for the shadow and lost the bone.” A good clientage, well cared for, will furnish an income which fires can not consume, floods wash away, or panics destroy; and the lawyer who lives within that income, and invests his surplus earnings carefully and safely, is sure to end his days in comfort, and to leave a competence to his family. Above all should the attorney avoid any speculations with his

client. He may often be importuned to purchase his client's judgment, claim or property, and to be shown the glittering prospect of gain through such a source. He is sure to lose his client's regard, if he wins, and to forfeit his respect for his business judgment, if he loses.

**§ 85. Promptly attend to your correspondence.—** It can be safely said that the lawyer who at once replies to his clients' or correspondents' letters is sure to retain their esteem and business. It should be an inflexible rule that all the correspondence of the office should be disposed of the first thing in every business day. It is an unfailing rule in a successful business office, and is of equal value in that of the lawyer. An index to a lawyer's success can be found in his letter copy-book; if it is there seen that he is prompt in his correspondence, rest assured he has his share of the clientage of his town. There are lawyers who have said that clients' letters often answer themselves if left alone; that is, do not require an answer after a few days. That may occasionally be true, but the lawyer who falls into such a habit will sooner or later find that he has no letters to answer—beyond the duns of his creditors. To change an old saying: "When the letter-carrier ceases to come through the door, the clients have flown out of the window."

**§ 86. Cultivate the acquaintance of other lawyers.** —It is remarkable how much business the lawyer receives from others of his profession, and for this reason it is of value to be favorably known to as many of them as is possible. From the great business centers radiates a large volume of legal business to all parts of the country, and much

of it flows from the offices of other lawyers. To secure a fair share of this the attorney is aided in no surer way than by an acquaintance with others of the profession. For this reason it is recommended that the beginner, as early as it is possible, should join the bar association of his state, as well as the American Bar Association, and make it a point to attend their meetings. He will find, throughout his professional career, that the acquaintance and friendship of lawyers in all parts of the country go a long way toward swelling the volume of his business.

**§ 87. Avoid politics.**—At the risk of obtaining but partial approval, the writer can not refrain from expressing his views against the advisability of the beginner at the bar taking any part in politics. He firmly believes that the lawyer should devote himself to his profession, and seek the rewards which it offers, rather than to pursue the ephemeral fame of a political career. Time enough it is to enter that field when age and professional experience have ripened the judgment and matured the mind.

Nowhere has the saying, “no man can serve two masters,” been better proven than in this matter. The lawyer in politics loses his independence, a matter of vital importance to his success, and is apt to be weaned from the ambition which should fill the mind of every lawyer,—to win the foremost place in his profession. Those who have achieved fame as statesmen have most frequently first made themselves great lawyers. American history is crowded with recollections of such men ; we need but refer to Webster, Clay and Lincoln, of other times, and to Conk-

lin, Tilden and Evarts, and to a host of others, of modern days.

**§ 88. Professor Washburn's advice.** — Professor Washburn's advice on this subject is most excellent. He said: "Before he accepts political office, let him make for himself a character and reputation as a lawyer, and, what is more, let him establish in himself the habits of thought and tastes and culture of a well-trained, self-reliant lawyer. If, before he has done this, he allows himself to be seduced by flattery from the life of circumscribed professional duty he has chosen, into the stirring scenes of party and the fascinations which beset one as a public man in the capital, it is rare that one feels content to go back to the hard work of his profession, and the irksome drudgery to which he must submit if he hopes to win success. Instead of that the chance is, as has happened to hundreds of others, that, after a brief period of enjoyment of the honors and patronage of place, he becomes a political mendicant, thankful for some clerkship or salaried agency, with the ever-present consciousness that he has had his share of the heritage, and spent it like the prodigal of old, and must now live upon party charity.

"Whereas, if he will first become his own master, and so train himself that he can go back to his profession and know that he can earn an honorable independence in that, let what changes may come in the political world, he may go into congress, or any other post of honor, without fear of compromising his own dignity or independence. Such lawyers as these, when they can be had, are among the very best legislators in the country. But of all conditions in

life I know few more to be deplored than that of a hopeful, ambitious young lawyer, who, conscious of good powers of mind, and with high aims at excellence, has suffered himself to be deluded into politics by the flattery of the press, or the applause of the caucus-room, and has been left, after a few years of pleasant delirium, to look back upon opportunities wasted and hopes disappointed, by having given up a career where success had been certain.'"<sup>1</sup>

But if he seek preferment let the lawyer consider the advantages of the bench, filled, as it should be, by those who have first of all been leaders in the profession of the law. The fame of a great and good judge is everlasting, for it is engraved in the language of the reports, never fading, but read and known long after the tomb shall have covered the dust of those whose pens have written the words of the law, a fame enduring as long as time itself shall last.

<sup>1</sup> Lectures on the Study and Practice of the Law, 289.

## PART II. THE LAWYER IN HIS OFFICE.

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### CHAPTER VIII.

#### THE OFFICE LAWYER AND HIS OFFICE.

- § 89. The office lawyer.
- 90. His office and its location.
- 91. Value of good offices.
- 92. The office appointments and furnishings.
- 93. Clients and visitors impressed by a good office
- 94. Offices should be neatly and cleanly kept.
- 95. Good offices, good fees.

§ 89. **The office lawyer.**—It is the purpose of this part of our work to discuss the duties and labors of the lawyer in his office, as distinguished from those of the court room, with some suggestions as to the location and care of his office and the selection of his library.

It is conceded that there are two main branches of professional work, connected and yet separate ; the one, the trial of causes, the other, the labors performed entirely in the office of the lawyer, and distinct from the preparation and trial of his cases. We deal now with the office lawyer, considering him as concerned with the affairs of his clients not requiring his attention in the court room. It may be premised that the chief and leading characteristics of such a lawyer should be that he is a good business

man; that he possesses sound sense and good judgment, together with a thorough knowledge of the law, its principles and forms; and that he is a master in the art of comprehending human nature. He must be systematic, shrewd, cautious and conservative; ready to work quickly and promptly; gifted with expedients, and filled with a desire to succeed in doing his duty to the satisfaction and profit of his clients. In his office the average lawyer must expect to find his chief income, as well as to most certainly secure the respect and confidence of his clients and of the public. He should never suffer defeat in this work, being able to say that all that he has there done has been performed well and faithfully. Possibly, we have here described the ideal lawyer, and have set forth the higher qualities of the advocate as well as of the attorney. The object has been to exhibit the highest ideal, for that alone should satisfy the aim of the ambitious lawyer.

**§ 90. His office and its location.**—The lawyer's office should reflect his own characteristics; meaning that it should show evidences of industry, neatness, system and success. It should be well located, in that portion of the town occupied by lawyers' offices, and, if possible, in a building where others of his profession are established, as he can ill afford to locate his office in a street or section unfamiliar to clients or distant from other lawyers. He is fortunate if he can select a location which will be permanent, for changing an office is sometimes likely to result in loss of business. This is particularly true of the larger cities, where a removal from an established and well-known place could easily be

followed by a loss of clientage. It seems strange, but it is none the less true, that there are some clients, who, having once established the habit of going to a certain office for their law business, will continue to come there, even if it have different occupants. Such are among the least desirable clients; but clients, like all mankind, are more or less creatures of habit. A merchant's stand may have much more value than a lawyer's location, but the latter is not entirely without importance to him.

**§ 91. Value of good offices.**—The beginner must remember that he is likely to be unknown to many of those who seek his services, and, for that reason, should present appearances likely to command their respect. Appearances, of course, are not the only essentials; without the qualifications which make the successful lawyer they are of but little worth; but, with those qualities, they are serviceable to the beginner, as tending to inspire confidence, and to attract the attention of those he desires to number among his clients. It can not be denied that many a famous lawyer has commenced his professional career with the barest necessities of an office; still it is equally sure that his condition was a drawback to his success, and that he would admit that one of the means by which a lawyer can gain a clientage, at least at the outset, is by providing himself with attractive surroundings.

**§ 92. The office appointments and furnishings.**—By reason of the value of good appearances it is true that the beginner at the bar should, if possible, start with well appointed and furnished offices, and equipped with the modern conveniences. Experience

proves that the expense of commodious quarters, well furnished, fitted with the modern conveniences of the stenographer, typewriter and telephone, thus affording the facilities for the rapid transaction of legal business, and garnished with the best adornment of all, a good law library, well repays the cost of the outlay, and materially assists in forming a clientage. All this may seem to the young lawyer to be advice given without good foundation. He may say: "What use have I for a stenographer and a typewriter if I have no business with which to employ them? Why need I a library when I have no clients to require its use?" True, in a sense, and still the lawyer should have his appliances, as much as the mechanic his tools. The point is to be ready to do the business when it comes, and to be ready to do it as well as other lawyers longer established. The writer admits that much of what he says on this subject is but a tantalization to a beginner, who is without the means to secure those things which are recommended as helpful to his success. Yet they are helps, and should be had, if within the possibilities. Other expedients, such as securing the services of a public stenographer, or the use of a public library, when they can be had, may suffice, and every one must be governed by his environment and his circumstances in life; still, it is believed the suggestions here given are of value, and are offered for what they are worth.

**§ 93. Clients and visitors impressed by a good office.**—A stranger comes to give a lawyer employment; to him, possibly, he is but a name; he may know but little of his character or ability, and has

come, perhaps, by accident, or by reason of the recommendation of a mutual friend. If he finds the lawyer in a dingy office, unkempt and unswept, with but two or three books, and few evidences of thrift and success, he can not fail to have obtained a very poor impression of his standing at the bar. If, rather, he comes to an office neatly kept, furnished, at least fairly well, with a respectable library and evidences of some prosperity, he is likely to feel that he has made no mistake. Some clients read with their eyes, and from their opinions of the attorney formed in that way, as well as through what they may see and hear of him, judge of his accomplishments and ability.

In addition to those who go to the lawyer's offices to obtain his professional services, there will be others who come in the way of business with him or with his clients. These visitors can not fail to be favorably impressed by the appearances of thrift and prosperity which well appointed and neatly kept offices would present, and may thereby be induced to seek that lawyer when themselves in need of legal assistance.

**§ 94. Offices should be neatly and cleanly kept.—** Whatever the young practitioner can afford in the way of an office and its appointments, surely nothing should prevent him from keeping them clean and neat, thereby giving ocular proof to his visitors that system and order rule his habits. A successful business man is usually found in a neat and orderly kept office, and when he enters the apartments of a lawyer, and fails to there find evidences of those qualities, he is likely to hesitate before he

employs one who he is not sure is of systematic and orderly habits. Clients must entrust valuable papers to their attorneys, and if they are not certain that they possess business-like habits, or, from carelessness, may lose or mislay their papers, they may hesitate before employing them. For this reason the lawyer's office should not only be well kept, but his books and papers should be so arranged and filed as to be readily found. These may seem to be little things, but so frequently do small affairs control great ones, that the lawyer can not be sure that an absence of care for them will not result in his being refused the charge of more important trusts. The parable of the talents can be read by the beginner with interest and advantage: "Thou hast been faithful over a few things, I will make thee ruler over many things."

**§ 95. Good offices, good fees.**—In conclusion, it may be stated as the experience of the profession, that a client will be prepared and expect to pay larger fees if he finds the lawyer in a handsome office than if he goes to an inferior one, an index, perhaps, of a cheap lawyer. That there are such lawyers at every bar none can deny. How cheap their services may prove to be in the end may sometimes be questioned by a client who has afterwards found that the advice given him, or the services rendered, were of the same order as the fees he paid the attorney—poor and very small. Some clients—alas, too many—are apt to ask for cheapened services, or, at least, seem to be willing to pay only small fees. Perhaps such men would be induced to offer more, or, ashamed not to pay a fair compensation,

when the surroundings in which they find the lawyer would indicate that he was not of the narrow gauge order. On the contrary, they might be emboldened to offer a smaller fee, and to demand greater services therefor from an apparently low-priced attorney. Every lawyer who has a good office will admit, upon consulting his fee-book, and reviewing his clientage, that any extra expenses to which he may have gone in its location or furnishings have paid for themselves many times over.

## CHAPTER IX.

### THE LAWYER'S DOCKETS, BOOKS AND PAPERS.

- § 96. The system of the office.
- 97. Dockets.
- 98. Other office books.
- 99. Office papers.
- 100. Value of keeping receipts.

**§ 96. The system of the office.**—A thoroughly systematized office shows the successful lawyer. He who does not well care for his own affairs can not be expected to be entrusted with those of others. If, at the outset of his practice, the attorney will adopt a complete and thorough system for his dockets, books and papers, he will ensure a saving in time when his practice has increased, amply repaying him for his early attention to these details. The lawyer who commences his profession without some methodical arrangement of his business will either lack a future valuable clientage, or, if he obtains it, will lose many an hour in searching for that upon which he should be able to lay his hands without the slightest difficulty. Nothing is so troublesome to the attorney as the proper care of his papers and dockets. His business is of such a multiform character that the systems ordinarily adopted by business men do not meet his requirements. He needs a plan which will enable him, without loss of time or patience, to find a

complete record of all his cases and business, particularly of all his papers, and without any delay or hesitation. It is the purpose of this chapter to recommend such a system to the beginner at the bar. It is one founded upon actual experience, and no little inquiry among members of the bar whose practice is large and varied.

**§ 97. Dockets.**—The object of a docket is to preserve a record of the lawyer's cases. Let it be premised by saying that it is of great value to bring as much of the lawyer's business as is possible into the form of indexed cases. To do this he should divide his business into two classes: one of matters not in court, and the other his contested cases. In other words, his office business and his court business. The first could be called his Collection Docket, and should include everything involving the collection of money. He will find that this will cover no small portion of his office business, and, properly indexed, will give him ready reference to all it may contain. Put everything there in the name of a case, making the creditor plaintiff, and the debtor defendant. Such a docket should be in size, say fourteen inches long and nine inches wide, well bound and including about seven hundred pages. Arrange it for two cases on each page, leaving extra leaves at the end for the continuation of any case requiring more than its allotted space. After noting the names of the plaintiff and defendant state the nature and amount of the claim, the addresses of both parties, and, if received from another lawyer, or a collection agency, their names and addresses. Make full notes of all that is done in the case; memoranda of letters written or

received concerning it, and a record of its settlement or disposition.

Give each case a number, of course in sequence, and use that number in all correspondence and papers connected with the case. When the matter has been concluded, either by payment or its return to the client as uncollectible, mark the case in the docket as settled in some plain way, so that, in going over the docket to keep up the business, a glance will tell if the case has been closed or needs further attention. The other, which can be called the Court Docket, should be similarly kept. Here make a record of all causes which are to be prosecuted or defended in any court of record, transferring to it from the Collection Docket anything which is to be litigated. In this docket each case should also be numbered, and the papers and correspondence connected with it similarly marked.

There are some matters, however, which do not fall within either of the classes given ; such as estates of decedents and insolvents, pensions, patent and license applications, road views, and many other miscellaneous subjects not necessarily coming under the head of cases, but to be so kept of record as to require docket entries. This business could either be included in the Court Docket or in another, to be known as the General or Miscellaneous Docket. Such matters should also be so numbered and named, and so systematically recorded, as to be easily and readily referred to. It is suggested that a general name for each of these matters could be: “Estate of \_\_\_\_\_,” “In the matter of \_\_\_\_\_,” or, “*In re* \_\_\_\_\_. ” For example: “Estate of John Doe, de-

ceased"; "In the matter of a public road in Smith Township"; *In re* application of Richard Roe for a pension."

Proper indexes are essential to all dockets. They should be double; that is one for plaintiffs (or creditors), and the other for defendants (or debtors), sometimes called an "Adsectum." It is recommended that these indexes should be kept in books separate from the dockets themselves, and should be subdivided by putting the surnames in one of the vowels coming first in the name, called a "Vowel Index." These indexes should also refer to the docket number of the cases rather than to the page of the docket, as thus the files of the cases will also be indexed, and the papers therein found from the indexes without the necessity of going to the dockets. These files are described later, but it will be proper to say here that each file, containing the papers of a case, should bear on its cover the name of the case and its number in the docket.

In addition to these dockets, there should also be one for judgments, alphabetically arranged, giving the number of each case, followed by the name of the defendant, that of the plaintiff, the court where entered, the date of entry, the amount of the judgment, and the date from which interest runs. This is of use in ascertaining if you are interested in any judicial sales of real estate, and, also, in states where judgments must be revived after a certain length of time, in order to preserve their lien, by making a memorandum in the same docket of all judgments needing such revival in any one year.

**§ 98. Other office books.**—In the way of his own business the lawyer needs a cash-book for the entry of all receipts and disbursements, a day-book for the charges for his professional services and other entries, and, of course, a ledger. If he has any knowledge of book-keeping, as he certainly should have, he will know how these books can easily and readily be kept. His own accounts should always be well in hand and he should be able to tell, in a very short time, the progress of his own professional affairs, and the state of his accounts with his clients. It is well, also, to have a private memorandum-book or a ledger, where he can make entries of all he may do for a given client, or concerning a particular matter, in which he does not then desire to make a charge, but enters the items simply as memoranda for future charges when the business has been concluded. Experience shows such a book to be very valuable, as it not only refreshes his recollection of all he has done, but will enable the lawyer to convince his client of the fairness of his bill when rendered.

An important requisite of the lawyer's office is a letter-press book, in which can be contained copies of all the correspondence leaving his office. It should be an invariable rule with the lawyer to never mail an uncopied letter. The greater majority may never be looked at again, but the few which he will need will prove the value of preserving them all, because he can never tell when he may find it of the greatest benefit to turn to a copy of that which he has written, although at the time it may have seemed to be comparatively unimportant.

The other books needed are a daily memorandum, or office diary, containing all engagements, to be consulted every morning as soon as the office is reached, and an office directory, including the names and addresses of all clients, and of those with whom the lawyer has professional or other business.

**§ 99. Office papers.**—Following the suggested system for the dockets, the papers, after being numbered in accordance with the docket number of each case, should be put in an envelope containing the name of the case and its number. By keeping in its numbered envelope all the papers connected with a given case, and by placing the envelopes in pigeon-holes in consecutive order, it is but a moment's work to find all that is desired. One of the lawyer's annoyances, and sometimes it is not a petty one, is to search for his papers. Every unnecessary moment devoted to that work is a loss to him and to his business, and, hence, a system which reduces that labor to a minimum is of direct advantage. The old saying that "a stitch in time saves nine" will be found to be true when the lawyer is hunting for a mislaid document, and he remembers that if it had been put away with some system it could readily have been found.

When a case is settled on the dockets it should be so marked, both there and on the envelope, and the latter filed in separate pigeon-holes devoted to "settled cases." Thus, the dead wood of the office is separated from the living timber, and the live cases can then easily be gone over, from time to time, to keep the work of the office up to date.

Papers not connected with docketed cases, or matters there recorded, can be filed in special envelopes.

Thus, correspondence, copies of opinions and documents not connected with any case, but concerning a client's general business, can be so filed away, using an alphabetical plan, so as to be easily found when required. If to this is added a "post-office," alphabetically arranged, for miscellaneous correspondence, not connected with any case, or matters of regular clients, all the papers of the office could be readily kept, and found when needed. The lawyer is often made the custodian of his client's wills, deeds, agreements, etc. Such documents could be filed in special pigeon-holes, one for each class, and thus be readily found. For a client whose papers are kept in one place, this plan might not be practical, but even then, to carry out the system, and make it complete, a paper could be filed among the wills, etc., showing where those of that class belonging to a particular client are to be found.

**§ 100. Value of keeping receipts.**—The lawyer's receipts should be carefully preserved; those concerning a case in its envelope, and such as do not belong to a case, but are personal bills, filed in order for each year; thus, when required, proving readily found vouchers. His paid checks, when returned from the bank, should be separately filed in the order of their consecutive numbers, thus becoming vouchers of the greatest value. If the lawyer uses checks printed with an extra line to show the payment they make, they become perfect receipts.

The writer has in mind an instance where carefully kept dockets and the preservation of the papers in the case, as also of the check used in its settlement, proved of no little value, and relieved a lawyer from what

might otherwise have proven an embarrassing situation. Some years earlier the lawyer had received a collection from an attorney in one of the larger cities, and in time had secured the amount, which was not inconsiderable, and in due course remitted it to his correspondent. Later, the client, who had never received the money, ascertained from the debtor that he had paid the claim to the lawyer, and called at his office for an explanation. He was able to show the client full docket entries of the case, and of its disposition, and, turning to the files of his settled cases, and to his letter-books, produced all the correspondence with the city attorney, showing, also, his receipt for the remittance, and clinched the matter by producing the check bearing the attorney's indorsement, which also showed that it had been paid through bank. All this was exhibited in a few moments, although the transaction was several years old. This positive proof cleared the lawyer's skirts, and enabled the client to make the dishonest correspondent disgorge. The instance is quoted as one showing the value of a well-kept system in an attorney's office.

All this may seem to be but matters of little moment, but their careful observance will result in the preservation and economy of the lawyer's chief capital—time—and will show that attention to the smaller things of his own proves his competency to care for the greater affairs of his clients. The writer would not assume to himself the credit of having suggested a perfect system, or one better than others may use; he has described a system which has been in use in his own office for more than twenty years, and found to be practical and satisfactory.

## CHAPTER X.

### THE LAWYER'S LIBRARY.

- § 101. Public and club libraries.
- 102. The private law library.
- 103. Text-books: their test.
- 104. Text-books: the order of their purchase.
- 105. Reports.
- 106. The cost of such a library.

§ 101. **Public and club libraries.**—The size of the beginner's law library must necessarily depend upon his ability to purchase books, and is often controlled by the access he may have to public libraries. Law books are to the lawyer as tools to a mechanic; for them he has daily need, and it is doubted if he could have too many. For those who have access to public libraries, to those of bar association, or of lawyers' clubs, it may be unnecessary to purchase many books, but this chapter is addressed to those who may not thus be favored, as well as to those who desire libraries in their own offices for ready reference and use. It has occurred to the writer, although he knows of no instance where such a plan has been adopted, that a number of lawyers located in one building could combine their funds and become possessed of a large and valuable library, and much more extensive than any one of them could afford, but, by means of this clubbing system, within the limits of ordinary

incomes. Such a plan might be so perfected that this common library could be used by all its owners in one room in their office building, without being compelled to leave the building, or to go far from their offices. It is believed that such a plan is entirely feasible, and that it would prove highly satisfactory.

**§ 102. The private law library.**—It is a most satisfactory plan, and one adopted by many lawyers, to use one of the rooms of their suite of offices exclusively for the library. There their cases are prepared and there alone the books are used, leaving the other rooms for the business of the office, reception of and interviews with clients, etc. Books scattered through a number of rooms render their use awkward and cumbersome; while one room devoted to the library, if the office can be so arranged, affords a quiet place where the lawyer can secure the privacy which he so much needs when engaged in the study of a legal question.

It is the purpose of this chapter to suggest that which might be termed a working law library. In its entire extent it is far more than the beginner can expect to possess, and, indeed, should be regarded as a large library, even for the active and successfully established lawyer. The intention is to describe a lawyer's library in the order in which the books should be purchased; the completed whole being all that he can reasonably need at the height of his professional success.

Law books have so multiplied of late years that, of necessity, there must be some of but comparative

value. The attempt is here made to separate the wheat from the chaff, and to suggest that which has before been named, a lawyer's working library. There is first given a list of text-books, followed by the reports. It should not be understood that text-books are required before the reports; on the contrary, many of the reports should be placed on the lawyer's shelves before he freely purchases the former. Reports never grow old, while new editions of text-books are constantly being issued, destroying much of the value of the older publications.

**§ 103. Text-books: their test.**—It is not intended to suggest the books of any authors, it being sufficient to say that the text-books should be in the latest editions, and purchased from leading and responsible publishers. A book should be closely examined before it is purchased. A test of a text-book is to criticise the manner of its arrangement, the accuracy and number of its citations, and the care and skill shown in its index and table of contents. If these are full and thorough it can be presumed that the book has been written with equal care. Another test is to turn to one of the subjects with which the reader is familiar, and mark the care with which it has been treated, comparing the citations with the original reports, to note their accuracy and their pertinency to the subject. Those text-books are the most reliable which carefully collect the cases, and weigh them together when they differ; make a thorough and philosophical discussion of the questions of law involved, all clearly and precisely stated, and without containing too much of the writer's private opinions on a proposition of law.

**§ 104. Text-books: the order of their purchase.—** As has already been said, the first studies of the beginner at the bar should be in the statute law of his chosen state, the practice as administered in his courts, forms of procedure and conveyancing, and the rules of courts, and, hence, his first purchases should be in those directions. After these should follow the text-books in the order given below. It is extremely difficult to accurately suggest the books to be procured; but, in a general way, those first given will be the most frequently used by the beginner. The latter portion of the list is made without any special regard to their relative value, but as giving the titles of the various text-books which go to make up a complete working library.

The list is this: Contracts, Sales, Actions and Defenses, Pleading, Evidence, Criminal Law and Procedure, Law Dictionaries, Real Estate, Decedents, Wills, Domestic Relations, Equity, Agency, Negligence, Damages, Torts, Fraud, Executors and Administrators, and Partnership. The other subjects named, without observing any order as to their value, are: Assignments, Attachments, Bailments, Bills and Notes, Carriers, Conflict of Laws, Constitutional Law, Corporations, Divorce, Easements, Electricity, Estoppel and *Res Judicata*, Eminent Domain, Extraordinary Remedies, Fraudulent Conveyances, Highways, Injunctions, Judgments, Legal Maxims, Libel and Slander, Leading Cases in Law and Equity, Mortgages, Municipal Corporations, Nuisance, Railroads, Receivers, Removal of Causes, *Ultra Vires* and Waters and Water-courses. Other titles could be suggested, but it is believed these lists cover all the text-books needed in the private library of the law-

yer, particularly if it is well filled with reports and is completed with the modern digests, which are of much assistance in furnishing late cases in support of the statements of law laid down in the standard text-books.

When one follows a special line in the profession it is needless to say that he will purchase everything which has been published in any way connected with that subject.

**§ 105. Reports.**—Much care has been exercised in making this selection, and it is believed that all those here named would furnish the lawyer with a well equipped library of reports. Their purchase is suggested in the following order:

*First.* The reports of the courts of last resort in the state of his practice.

*Second.* The reports of the inferior courts of his state. These are particularly useful because they contain so many cases treating of the procedure and practice in the state courts. As is hereafter noted,<sup>1</sup> judges incline more toward the decisions of the lower courts of their own state than to the adjudications of the courts of last resort of the sister states or of England.

*Third.* The reports of the Supreme Court of the United States. The lessened cost, and valuable annotations, render the Lawyer's Co-operative Edition worthy of commendation.

*Fourth.* The American Decisions, containing the leading cases in all the courts of last resort in the United States from 1760 to 1869, and covering one hundred volumes.

*Fifth.* The American Reports, of a similar nature, from 1869 to 1888, in number sixty volumes.

<sup>1</sup> Chapter XXI, § 202.

*Sixth.* The American State Reports, from 1888 to the present time. These three sets, all admirably annotated, and the two former well digested in Rapalje's Digest, cover the best of the adjudicated cases in the entire field of American jurisprudence, and enable the lawyer to find an authority upon nearly every legal question. Of the same nature are the Lawyer's Reports Annotated, commencing with 1888.

*Seventh.* The Federal Cases, being the reports of the various United States circuit and district courts from the commencement of the government to 1880.

*Eighth.* The Federal Reporter, a continuation of the reports of those courts, and extending from 1880 to date.

*Ninth.* The English Common Law Reports ; English Chancery ; Exchequer ; House of Lords' Cases, including Clark and Finelly's Reports ; and the Law Reports, commencing in 1865 ; to which might be added the older British reports, antedating the Common Law, Chancery and Exchequer, which began in the American edition at about 1815. The older English Reports, now accessible, are these (the name of the court in small capitals and of the reporter in Roman type) :

HOUSE OF LORDS: Brown, Dow, Bligh.

CHANCERY: Vernon, Peere Williams, Atkyns, Vesey Sen., Vesey Jr.

KING'S BENCH AND QUEEN'S BENCH: Dyer, Coke, Croke, T. Raymond, Saunders, Modern, Salkeld, Lord Raymond, Strange, Wilson, W. Blackstone, Burrow, Cowper, Douglass, Durnford and East, East, Maule and Selwyn.

COMMON PLEAS: H. Blackstone, Bosanquet and Puller, Taunton.

EXCHEQUER: Anstruther, Price, Daniell, McClelland, Wightwick. The last four being included in an American edition, entitled Exchequer Reports, in six volumes, and published in Philadelphia in 1835.

NISI PRIUS: Peake, Espinasse, Campbell.

ECCLESIASTICAL: Lee, Haggard, Phillimore, Adams, Curteis; all combined in the English Ecclesiastical Cases, in seven volumes, published in Philadelphia in 1831, and including valuable probate and divorce cases.

Tenth. Special Reports: such as American Railroad and Corporation Reports, American Negligence Cases, American Electrical Cases, National Bank Cases, etc.

§ 106. **The cost of such a library.**—The text-books and the reports here named could probably be purchased at a cost between \$3,500 and \$4,500, depending somewhat upon the prices of the reports of the state of the lawyer's practice. Many of these books can be secured at second-hand, and some of the older English reports at a very low figure. The cost of a lawyer's library can, of course, be much extended beyond that named, by adding all the text-books and the full reports of a number of the states. The object has been to suggest a library with as little duplication as possible, but still supplying the lawyer with what will generally fill his wants, and one by which he can prepare his cases without the necessity of using a large public library.

## CHAPTER XI.

### GIVING PROFESSIONAL ADVICE.

- § 107. The duties of the office lawyer.
- 108. Responsibility in advising others.
- 109. The lawyer's ethical position in advising others.
- 110. Mastery of the facts necessary to properly advise.
- 111. Avoid hasty and immature opinions.
- 112. Written opinions.
- 113. Advise with judgment and discretion.
- 114. Cases involving small amounts should be compromised.
- 115. Advising compromises.
- 116. Other reasons for advising compromises.

§ 107. **The duties of the office lawyer.**—It is now intended to consider, somewhat generally, the various kinds and classes of labor the attorney performs in his office and outside the preparation of causes, and of procedure ; those subjects being discussed in the third part of the entire work. It is quite impossible to cover everything the lawyer is called upon to do outside the court-room, because he is such a general agent of the public that his duties are often extended beyond those of a purely legal nature. For the reason that one is a lawyer some people, and especially the most ignorant, consider him as gifted to do anything and everything, and consult him at all times and upon all occasions ; often upon subjects far removed from that of the law. This is especially the experience of the attorney who practices his profes-

sion in a smaller community. For example, should one of his fellow-townsmen aspire to public office by appointment, he hastens to the lawyer to draw his petition or application ; if he desires to have a municipal ordinance drawn he deems the lawyer alone fitted for the work ; should he wish for a street lamp or a fire-plug in front of his residence, the petition must be prepared by the attorney ; when he desires to aid or prevent legislation, he needs must ask the lawyer to join the "third house" of the legislature and there become a lobbyist ; and when he dies, and obituary resolutions are to set forth his good deeds, they must emanate from the professional pen. Honored is the lawyer who is called upon to serve his fellow-citizens in all their affairs, but it can not be added that he is always happy in, or well paid for, such labors.

In a general way, the attorney's office work of a legal character may be included within these subjects: Giving Professional Advice ; Drawing Last Wills and Testaments ; Preparing Contracts ; Conveyancing ; Searching Titles and Making Abstracts ; Settling the Estates of Decedents and Insolvents ; the Formation and Professional Care of Corporations, and the Collection of Claims. To these subjects, and in the order given, this and the succeeding chapters of this part of our work are devoted.

**§ 108. Responsibility in advising others.**—Giving professional advice is a most important part of the lawyer's professional duties. It involves the highest obligation, calls for the exercise of marked skill and ability, and requires the utmost care and caution. No one occupies a position more responsible than

does he whose advice becomes the rule of conduct of his fellow-men. When that counsel has to do with the preservation of his client's property, and, often, of his domestic felicity and personal honor, the lawyer must feel the burden imposed upon him. In the trial of a cause, he takes the facts and circumstances as they are, and feels his duty to be bounded only by the proper trial of the case; but in giving advice he is creating facts which may result in litigation, hence, there is upon him the greater responsibility, and one he can not shirk, for upon the result of that counsel may possibly depend both his client's weal and his own fame and professional standing.

**§ 109. The lawyer's ethical position in advising others.**—At the outset, the lawyer must be sure that he is in a position to advise his client. By this is meant that it must be certain that he is in no manner concerned, either personally or professionally, in antagonism to his client's interests, touching the questions upon which an opinion is sought. When offered his retainer the lawyer should disclose to his client any reason why he may not serve his interests, or of any relation he may bear to the other parties. It is a delicate position, but it is all important that his course in this regard should be governed by the highest rules of honor. The client's cause must not be jeopardized by the lawyer's fear, favor or affection, and, before all else, he must not have any interest or connection, however remote or indirect, with both sides of a cause; his loss of reputation in this respect—and it is a trait of character closely watched by the public—would be irreparable. He had far better lose valuable clients than to be known as a

lawyer in whom the most implicit confidence can not be placed.

At times the counselor will find himself in the embarrassing position of being asked to serve opposing parties, both his regular clients; this will happen more frequently than the beginner would suppose, and, as his practice increases, he will be surprised to find how often he is placed in this difficult situation. His sense of honor, as well as the ethics of the profession, command him to decline to act for either party. In such a case, and before the employment of other counsel, he is justified in seeking a settlement of the differences between his clients, by bringing them together, and endeavoring to act as a mediator and peace-maker; but failing in this, let them be advised and their cases tried by others. Temporarily, his clients may each feel themselves entitled to his services, but in cooler moments they will appreciate the justice of his action, and feel assured that when he does act for them their interests will be honorably and faithfully guarded.

**§ 110. Mastery of the facts necessary to properly advise.**—In giving professional advice it is of the utmost importance that the lawyer should understand all the facts and circumstances concerning which he is to give his opinion. To that end he should thoroughly cross-examine his client to elicit all the facts, some of which he may have inadvertently omitted, or has not considered necessary to an understanding of the matters upon which he desires to be advised. For the same reason the client's documents should be examined and carefully read, rather than to depend upon his statements of their contents. There

is a class of clients who come to their attorney as if he were a judge to decide their causes rather than a counselor to properly guide them aright after a complete knowledge of all the evidence, favorable or otherwise. Such clients are apt to conceal the weaknesses of their cases, thus hoping for a favorable consideration and adjudication. This trait of character shades through many of the lawyer's clients, showing in less degree in those of experience and education, but found to some extent in nearly all. Therefore, the lawyer must draw out all the facts before he can safely give his opinion. His cross-examination should be as rigid as the client may expect from opposing counsel when in court, and he should be warned to give his lawyer the vulnerable points of his case, and to tell him all of its doubtful facts. No one can safely advise a client until he is in possession of a full knowledge of the weakness as well as of the strength of his cause. Indeed, of the two the first is the most important, because it will be there that the client will fail, if at all, and, hence, his lawyer is unable to give him the counsel of wisdom until he first knows where that counsel is most needed, and concerning what facts his legal guidance is of the greatest necessity. Again, the trustworthy lawyer will not lead his client into litigation if he feels assured its result will be unsuccessful, and to be put in a position to give that advice he must be made aware of the danger points in the case, and of the places where the ice is the thinnest, for there the fatal accident will surely happen, if it is to occur.

**§ 111. Avoid hasty and immature opinions.—**Unless entirely confident of his ability to answer, the

lawyer should make a thorough examination of the questions submitted by his client, and give his opinion only after he is satisfied he is right. A judgment hastily formed may cause him subsequent regret and mortification. The beginner is apt to feel that his client expects an immediate answer, and, to show that he has acquired a knowledge of the law, is tempted to give his opinion without an examination of the authorities. This is a mistake. The client, if he is worth having, will more highly value an opinion given after a careful study of the law than one pronounced off-hand, and will commend his counsel for his care and caution. Unless sure of his position, the proper thing for the lawyer to say is that the question is worthy of an examination of the law, and to ask that he be permitted to answer after such investigation. For a similar reason, curbstone opinions, as they are called, should be avoided. Let the client be advised in the office rather than on the street, and then in a manner befitting the question propounded. It is very common for some persons—usually those looking for cheap law—to obtain a lawyer's opinion gratis, on the street, in the train, at the club, or in some other public place. The law there given is often as valuable as the price paid for the opinion—that is, nothing. The lawyer cheapens himself, and lowers his reputation if he falls into the habit of giving his opinion whenever and wherever he is asked a legal question.

Apropos of this is the familiar story told of an English barrister, who, when dining with his client, was asked over the after-dinner wine for his opinion

upon a question of law. The answer was given, and later the host was no little surprised to receive a bill for the professional services thus rendered. He paid the charge, but returned a bill for the wine and dinner consumed by the lawyer, who retaliated by a *qui tam* action against the gentleman for selling wines and spirits without having a government license; a clearly defined instance of the *lex talionis*.

**§ 112. Written opinions.**—A written answer is often appreciated by the client, and usually commands a better fee. However, it becomes the client's property, and if it is lame in its conclusions, or is lacking in the legal positions it assumes, it may sometime come back to plague the lawyer, and cause him subsequent mortification and regret. It is suggested that a signed opinion should only be given when the lawyer feels assured he has made no mistake. A written opinion should commence with a statement of the facts as given the counsel, followed by the questions he is called upon to answer, and should state that the facts as given are assumed by him to be true, and to be susceptible of proof.

**§ 113. Advise with judgment and discretion.**—The lawyer should be candid with his client, and frankly tell him his opinion of the case. If, in his careful judgment, he can not succeed in his cause or pursue the course concerning which he seeks advice, he should not hesitate to so advise him. He must lay aside the temptation to lead his client into a law suit whereby fees may be gained, or to please him by approving his apparent desire for litigation. The lawyer who does not always bend his opinions to the views or desires of his clients may lose some busi-

ness at the beginning, but, in the end, he will have earned the valuable reputation of discretion, good judgment and conservatism, and will attract business of value, as well as employment from those who depend upon him for their legal guidance; the clients whom all lawyers most desire.

**§ 114. Cases involving small amounts should be compromised.**—One of the greatest accomplishments the lawyer can acquire is to learn when “discretion is the better part of valor”; when to advise his client to seek a compromise rather than to go to law. Every experienced practitioner will readily admit that as many cases are lost from want of judgment in this direction as through absence of care in their preparation and trial. It has been said of more than one famed lawyer that “before trial he was as timid as a deer, but at trial as brave as a lion.” Again, there are causes, and such are among the first to come to the beginner at the bar, where the amount involved is so small that to gain is but to lose. Compromises in cases of this class should be cautiously sought, for the beginner might thus obtain a reputation for cowardice; yet, he must bear in mind the result of the litigation which may show to his client that while he has won a small verdict, and all he claimed, or has successfully defended another’s action for a trifling amount, still, from the expense of the litigation and the loss of his own time—matters not usually considered by the client when fired with a desire to go to law—he may find that he has virtually come out the loser. Success, like revenge, may be sweet, but oftentimes the client may think it has been too dearly bought, and the flower of victory may

contain the thorn of discontent with his lawyer, who did not at the outset advise him of the financial result; a matter of no little moment to the average client.

**§ 115. Advising compromises.**—The authors of a late work, and themselves skilled and experienced practitioners, have said on this subject: “It is often expedient as well as just to advise a compromise and thus prevent litigation, or, as the case may be, put an end to it. In many instances a fair compromise is preferable to a contest. \* \* \* The interests of the client are always and everywhere the chief consideration, and the conscientious advocate will not sacrifice or yield them to promote his own interests. He will not, on the one hand, allow the hope of distinguishing himself in court to influence his course, nor, on the other hand, will he permit a desire to secure the reputation of a lawyer, ‘who better loves peace and compromises than glory,’ to impel him to advise a client to yield what in justice ought not to be yielded. While it is true that a lawyer’s first duty is to his client, yet it is not wrong for him to secure, if he can do so without a breach of duty or a betrayal of trust, the reputation of ‘a maker of compromises.’ It carries us but a little aside from our direct path to say that it brings business to a lawyer to have it known that he advises compromises rather than provokes or encourages litigation, for such a lawyer gets credit for honest dealing that those lawyers who never effect compromises do not obtain. But the interests of the client overshadow all other considerations, and the lawyer who advises the acceptance or rejection of a

proposal of compromise must know his client's case in all its details, and carefully weigh the probabilities of success or defeat. It has been said, that 'the rights of society are so strong that no forensic contest should be waged, until at least one effort to compromise has been honestly made,' but this is true only in a limited sense, if true at all. The rights of society can not extend so far as to require the sacrifice of private rights where justice underlies those rights. It is no doubt expedient as well as just to make an effort to compromise in many cases before entering into contest, but it is not so in all. It is well enough always to act upon Shakespeare's admonition to 'beware of an entrance into a quarrel,' but it is not always necessary to seek a compromise before taking action. It has been said that 'there never was a just compromise,' and this, although somewhat extravagant, in a sense is true, for the term itself implies that one of the parties at least surrenders part of his claim or something to which he is justly entitled; yet the advice given long ago still remains good in many cases: 'agree with thine adversary quickly while thou art in the way with him.' Litigation is expensive, and it is often advisable to give up something of that to which we think we are justly entitled rather than to incur the danger of losing it all or having the better part of it eaten up by litigation. This is especially true where the question at issue is a doubtful one, or the amount involved is small and no great principle is at stake."<sup>1</sup>

<sup>1</sup> 1 Elliott's General Practice, § 445.

**§ 116. Other reasons for advising compromises.**

—In addition to the reasons already stated showing it to be advisable to seek a compromise rather than to resort to the law, these may be given. The client's domestic peace and happiness, or that of his family, may be endangered by litigation, and it might be wiser for him to sacrifice pecuniary gain than to lose the affection of those who are endeared to him by family ties. Among the uncertain things in this life is the result of a jury trial, and that should be taken into consideration in determining the advantages of a compromise. The client may meet unexpected difficulties, and matters which can not be foreseen may arise, any one of them proving fatal to success. He must depend very largely upon the evidence of witnesses, as well as upon the judgment of jurors and the views of the court, none of whom are always infallible. In short, very few cases are entirely free from doubt.

Prejudice is another element to be considered. It is a strong factor in all trials, particularly before juries, and the client may be one against whom bias may exist. Thus, corporations can not always expect to find perfect justice for them impaneled in the jury-box ; a rich man, sued by a poor one, may be compelled by the jurors to give up more than they would require from others ; a party's business, or religion, or manner of life, or general reputation, may militate against him ; and the client may be unknown to the citizens of the community where his case is to be tried, the "man at home" often having an unjust advantage over the "stranger within the gates."

Again, the age or ill health of a client, or of his witnesses, may cause death to end the case before it can be reached for trial; or a defendant, if recovered against, may be execution proof, whereby there may be a fruitless judgment. These and many other reasons which will suggest themselves to the lawyer, should be carefully considered in determining whether it is not wise to seek a compromise before entering into litigation on behalf of the client.

## CHAPTER XII.

### DRAWING LAST WILLS AND TESTAMENTS.

- § 117. Knowledge of testamentary law required.
- 118. Statutory requirements for wills.
- 119. The intention of the testator controls.
- 120. Competency—Undue influence.
- 121. Attesting witnesses.
- 122. Powers given the executors.

#### § 117. Knowledge of testamentary law required.—

The beginner in the profession should carefully prepare himself in the law of wills, studying their forms and familiarizing himself with the requirements of testaments, particularly as to their execution and the proper mode of witnessing them. It is a branch of the law of which the practitioner should have a good stock in hand. He may be suddenly called upon to draw a will, perhaps by a bedside, without opportunity to consult his library, or even to secure a form-book, and should be prepared for such an emergency. It is a branch of the law in which its usual forms and statutory requirements should be so well known as to be at his tongue's end. In short, the lawyer should always be able to successfully stand an examination on testamentary law. For example, the familiar clause attesting the execution of the will: “Signed, sealed, published and declared by the above-named testator, as and for his last will and testament, in the

presence of us, who, at his request and in his presence, have hereunto subscribed our names as attesting witnesses," (or whatever may be the usual form of attestation in his state) should be to the lawyer as is the alphabet to the school boy. The beginner would find it wise to thoroughly read established and adjudicated wills, particularly those set forth in the leading text-books, so that he may make their language and forms most familiar, and easily to be recalled when required.

**§ 118. Statutory requirements for wills.**—Note well the requirements of the statute law of the state governing testaments. Among them observe the age at which a testator is competent to make a will; if a married woman can become a testatrix without the consent of her husband; under what circumstances bequests or devises to religious or charitable uses are void; whether or not seals, and how many witnesses are required; and also how far secondary estates or executory devises can be created. In some of the states a devise to the wife is declared by statute to be in lieu of dower, even if not so stated in the will, in the absence of an expressed intention to the contrary; a clear opposition to the common-law rule.

**§ 119. The intention of the testator controls.**—It is to be remembered that the intention of the testator is to govern in the interpretation of his will; and as that intention can only be gathered from the language he uses, it is of the utmost importance that he should be made aware of the meaning of those words as defined by the adjudicated cases, or by statute. For this reason the instructions for the will should be taken from the testator alone, if that be possible. If

time permits first obtain his approval of a rough draft, feeling assured that he is fully aware of its terms and legal and practical effect. In this connection it is well to remember that the average testator does not think much beyond the present, or, at most, not beyond the lives of those then in being. Hence, the scrivener of his will should call his attention to the possibilities and contingencies which may arise, and ascertain if he desires to provide for them. Many a will, speaking from the death of the testator, but executed by him at a date long prior thereto, and perhaps thought by him to then take effect, has robbed one, or enriched another, in a manner quite contrary to the real intention of the testator ; a will, however, which must be interpreted by the language he has used, and distribution made accordingly.

**§ 120. Competency—Undue influence.**—The competency of the testator to make a will, and the absence of undue influence, should be assured. If the writer of the testament is named as a legatee or devisee he should be able to prove by others that the testator so intended, thus avoiding a possible accusation of fraudulently altering the will, or of inserting that which the testator did not intend. Romances have been founded on such circumstances, but sober facts, not dissimilar, are found in more than one reported decision. By far the safest rule is to have the will drawn by another, when the lawyer is to be remembered by a bequest or devise.

**§ 121. Attesting witnesses.**—The attesting witnesses should be persons of good character and of some intelligence. They must be others than those named in the will as legatees, and, in attesting the

testator's signature, should state their residences. In some states this is required by statute, but it is always wise to include them. The witnesses need not be aware of the contents of the testament, but should attest its execution at the testator's request, and in his presence, and must see him sign the will, or hear him declare his signature.

**§ 122. Powers given the executors.**—There are instances where it is wise to suggest to the testator the advisability of giving the executors full power of sale of his real estate. In cases where there are no debts, the takers are all *sui juris*, there is no question of testamentary taxation, and the executors are persons of the highest character and enjoy the full confidence of the testator, and in order to save publicity, it is well to provide that no inventory or accounting of the estate shall be published or exhibited in the probate courts, or in the office where they are usually filed. It is but rarely that such a provision can safely be inserted, and may in some states be prohibited by statute; but there are instances where such a course has been found to be very satisfactory, if only that it defeats the curiosity of a certain inquisitive class of citizens who run to the probate records to note the magnitude of an estate of any value, and thereby gain opportunity to harass and importune the enriched legatees. In addition, some men leave behind them investments which they do not care to have known to every one, and so take this course to avoid public knowledge of their holdings.

## CHAPTER XIII.

### PREPARING CONTRACTS.

- § 123. Skill required in drawing agreements.
- 124. The outline of a contract.
- 125. Secure all the facts, and include all the stipulations.
- 126. Use words expressing the intention of the parties.
- 127. Be sure the agreement is understood by the parties.
- 128. Agreements between litigants.
- 129. Legible agreements—Duplicates.

#### § 123. Skill required in drawing agreements.—

The preparation of contracts forms an important and lucrative part of a lawyer's office work. Few business men feel safe in doing this class of work themselves, and if they do write their own agreements often subsequently find that the result has been far from satisfactory, and, sometimes, that the few dollars then saved have many times over been expended in litigation which could have been avoided if an attorney had been employed in the first instance. It was said that one of the toasts at a lawyers' dinner was to the man who drew his own will. In these days, the health could more properly be proposed to the one who writes his own agreements; he is certainly the best friend of the profession.

The layman rarely recognizes the degree of skill required to properly prepare a contract of any intricacy. No other class of office work draws more largely upon the lawyer's skill and ability; and he

who has the talent to write the words of an agreement in all their delicate shades of meaning, clear, yet legal, technical, yet practical, and, above all, expressing the intention of the parties, is an artist of no mean merit. It is not difficult to recall agreements of so complicated a nature as to evince, in the highest degree, legal ability, an exceedingly practical mind, and no small literary talent, combined in the lawyer who wrote them. There is no better way to judge of the qualities of an attorney than to thoroughly analyze one of the contracts he has prepared; if it stands the test it can be assumed that it came from the pen of a good lawyer.

**§ 124. The outline of a contract.**—The various parts of an agreement consist of its date; the names and residences of the parties, naming first the one who is to do the acts provided for in the contract; the subject-matter of what he is to perform, and when and how it is to be done; the consideration coming from the other party; the various mutual covenants, agreements and conditions; and, finally, the signatures of the contracting parties; adding seals, if required, the names of attesting witnesses, and, if it is to be recorded, an acknowledgment before a notary, magistrate or the like. It is wise to carefully study well drawn agreements and acquire, as it might be termed, the swing of the proper contracting form. It is an art in which there will be improvement with practice, and one which will prove to be a pleasant part of the lawyer's duties. Nothing in his office work should give the attorney more gratification than to be able to lay before his client a

complicated and difficult agreement satisfactorily prepared.

**§ 125. Secure all the facts, and include all the stipulations.**—Before commencing to draw a contract it is necessary to know in detail all that is desired by the parties; which can be ascertained by requiring from them a statement of all the facts and circumstances deemed necessary to properly prepare their agreement, and to effectuate their intention, as it may be that their general statements do not cover all that the writing should contain. The point is to include all that the parties intend the agreement should cover. Sometimes they will say that certain things they will then, or afterwards, verbally agree upon. As one of the objects of an agreement is to avoid litigation and future difficulties, it is best, if it can be done, to include all their stipulations in the writing, so that future disputes may be prevented. It must be remembered that parol evidence can not be introduced to alter or vary the terms of a written agreement, unless that which is offered to be shown has been omitted by fraud, accident or mistake, or was an inducement for the execution of the agreement, and at that time.

**§ 126. Use words expressing the intention of the parties.**—The agreement should be tersely drawn, without shortening it so much as to obscure the meaning; using, so far as possible, the exact words of the parties, with no unnecessary technical terms. Plain and simple words are of greater value than those which are complicated or unusual. If technical terms of trade are to be included, be sure that they are understood by the parties, and that their ex-

act meaning is always susceptible of proof by experts in the trade in which they are used. It is to be remembered that an agreement will be construed so as to effectuate the intention of the parties, when the intention can be gathered from its language; hence, every contract should be prepared with the thought that it may in time form the basis of legal proceedings, and will there be reviewed in the strong light of a judicial construction. It would be most unpleasant to then learn that it had been so unskillfully drawn that it was found impossible to discover from its language what was the intention of the parties.

**§ 127. Be sure the agreement is understood by the parties.**—When an agreement is finished the scrivener should make sure that it is understood by the parties, both as to its language and its legal effect. The importance of this lies in securing that warp and woof of every agreement, the intention of the parties, which can only be assured when it is known that the agreement was thoroughly understood by them when it was executed, and that they comprehended all that it included. To that end the lawyer should be clear and explicit in his explanations, and should not permit the parties to sign the contract until he is sure that it contains that which they desire. An agreement is a meeting of the minds of its parties, and, hence, there devolves upon the lawyer the duty of writing for them that which they wish to be their contract, and that alone.

**§ 128. Agreement between litigants.**—If an agreement is to be drawn between parties to a litigation, touching the matters in controversy, the attorney preparing the papers should insist that the other party

shall be represented by his own counsel, thus avoiding subsequent criticism against the one who may have prepared the agreement, as having been drawn in the interest of his client. The signature of the counsel for the other party, in attestation of his client's execution, would relieve the writer from such an aspersion.

**§ 129. Legible agreements—Duplicates.**—It goes without saying that the contract should be legibly drawn, and that it should be executed in duplicate, so that each party may have one. The advent of the type-writer, now found in almost every lawyer's office, provides for both these suggestions; and, in these modern days, saves the necessity of an expert sometimes needed to decipher the handwriting of lawyers of other times, whose written words were often as difficult of translation as are the hieroglyphics of the ancient Egyptian priests. It can be truthfully said that the beginner in the profession who prepares his agreements neatly, with care, in good language, and without delay, will earn his client's good-will as rapidly as in any other manner, and thus be thought worthy of other professional employment.

## CHAPTER XIV.

### CONVEYANCING.

- § 130. Conveyancing forms part of the beginner's work.
  - 131. Difficult conveyancing.
  - 132. An ancient deed.
  - 133. Conveyancing requires accuracy.
  - 134. Execution by attorney-in-fact, seals, etc.

**§ 130. Conveyancing forms part of the beginner's work.**—Conveyancing, that is, drawing deeds, mortgages, leases, etc., is a class of business which will be among the first to come to the beginner's office. Much that has been said respecting the preparation of agreements is applicable to this subject. Conveyancing will be found much easier by reason of the fact that blanks, covering almost every required form, can be so readily obtained from the law stationers. Again, in many of the states, forms of conveyancing have been so much simplified by statute that it has there ceased to be as great an art as it was in other days, and still is, in a modified degree, in such parts of the country as retain the more ancient forms of the common law. It is requisite, however, that the conveyancer should be skilled in the law of real estate, and familiar with the terms required in the preparation of indentures.

**§ 131. Difficult conveyancing.**—However much the forms of conveyancing may have been simplified by

statute, or by practice, there are occasions when a lawyer must summon to his help a careful study of ancient conveyancing, and of the law of real estate, in order to meet the questions with which he is required to cope. For example, he may be employed to draw a deed containing complicated trusts, or difficult conditions. Here, he may find it necessary to make a thorough study of the law applicable to such a conveyance, and to look up ancient indentures to supply him with the proper forms. Work of this nature requires the exercise of the lawyer's best skill and talent, and may involve the greatest responsibility. Again, he may be employed to draw a corporation mortgage, possibly one for a railroad company, securing the payment of bonds against its property and franchises, and involving complicated directions to the trustee, and limitations upon its powers and responsibilities. Such work is given to lawyers of proven ability and commands large fees. No member of the bar should consider himself thoroughly skilled in the art of conveyancing until he is able to perform such duties as these. The beginner can not expect to be called upon in these classes of professional labor at the outset of his career, but none the less should he strive to so perfect himself in the art of conveyancing that when he is promoted to this higher station he may not be found wanting in ability to perform its duties.

**§ 132. An ancient deed.**—In the Appendix is given a copy of an ancient deed, prepared more than a century ago, which actually conveyed a title and was duly recorded. It is a curiosity in legal literature, and is not only pleasant reading, but is valua-

ble to the lawyer as it covers almost every form describing the acquisition of title, many of them being of practical use to the conveyancer. Its chain of title is certainly unique, for it commences with the beginning of all things earthly (barring the modern theories of evolution) and continues down to the date of the deed. It starts off with the enfeoffment in Adam and Eve by the Creator of "All that certain tract of land, called and known in the planetary system by the name of The Earth;" and by descent, through the children of our first parents, to their heirs; followed by partition among the peoples of the world, including an allotment of a portion thereof, "Known at present on the general plan thereof as Pennsylvania, to the Six Nations of America," and thence by deed to the Penn Proprietaries; followed by various titles, covering all forms by which title can be acquired, down to the grantor in the conveyance.

**§ 133. Conveyancing requires accuracy.**—It will be remembered that Dr. Warren in that delightful book, "Ten Thousand a Year," gave the Aubrey estates to the addle-pated Tittlebat Titmouse as the result of the trial of the case of *Doe d. Titmouse v. Jolter*, because the deed relied on by the defendant contained an erasure in a material part, not noted in the attestation clause. Parenthetically, it might be added that the young lawyer could not beguile his leisure hours in a more entertaining and useful manner than by reading this famous novel, from which he also could gather good lessons in professional ethics, in a negative way, from the inimitable

account of those precious scamps of attorneys, Quirk, Gammon and Snap.

**§ 134. Execution by attorney in fact—Seals, etc.**  
—If the conveyance is to be made by an agent, or attorney in fact, it should be remembered that his authorization should be by as high an act of the principal as if he were making the indenture. Thus, if a married woman is the grantor the husband should also execute the power of attorney, if the statute requires him to join in her deed, and their acknowledgment must be had in the statutory form. Reference should be made in the indenture to the letter of attorney, and to its date and place of record; it must be drawn as the deed of the principal by the agent, and not as his own act, and the acknowledgment is to be made as the act of the principal.

The number of attesting witnesses, and the form of the acknowledgment, must all be in accordance with the statutes of the state where the property is situated. As in the instance of the married woman's letter of attorney, so also of her indenture, if required by statute, as is usually the case, the husband must be joined in the execution and acknowledgment. When required by law, a proper clerk's certificate to the authority and official standing of the officer before whom the acknowledgment is made must accompany the deed, and the attention of the grantee should be called to the provisions of the recording acts, and to the necessity for placing his deed of record.

## CHAPTER XV.

### SEARCHING TITLES, AND MAKING ABSTRACTS.

- § 135. Care required and responsibility incurred in searching and abstracting titles.
- 136. Searches made in three ways.
- 137. The elements of a recorded title.
- 138. Continuation of the search of title.
- 139. Various modes of acquiring title.
- 140. Adverse conveyances.
- 141. Mortgages.
- 142. Judgments.
- 143. Mechanics' liens.
- 144. Public liens.
- 145. Taxes.
- 146. Attachments.
- 147. Lis pendens.
- 148. Decedent's debts.
- 149. Other encumbrances.
- 150. Exceptions to a certified abstract of title.

**§ 135. Care required and responsibility incurred in searching and abstracting titles.**—Among the various kinds of office work, and akin to conveyancing, is that of searching titles to real estate, making abstracts thereof, and giving opinions thereon. Professional services of this sort require care and accuracy in a marked degree. In these the client absolutely depends upon his lawyer, and an error may not only result in serious loss to his client, but may also render the attorney liable in an action for negligence. If for no other reason than to save himself

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from liability the lawyer should here exercise a high degree of care and caution.

**§ 136. Searches made in three ways.**—There are three modes by which a title may be searched.

1. Official searches, made by clerks of courts, recorders of deeds and mortgages, tax officers, etc. Probably everywhere, upon payment or tender of their fees, such persons are compelled to furnish, over their official signatures and seals, certificates of records, titles, liens, etc., for the accuracy whereof they are legally responsible. While these searches are valuable, and are often used by lawyers as part of their abstracts, it must be remembered that the responsibility of such officials does not usually extend beyond the ordinary limitations of actions, and that an action against them for a false or erroneous certificate is barred after six years from its date.<sup>1</sup>

2. To provide against this, and to secure a permanent certificate, there have sprung up all over the country, within the past few years, certain guarantee or real-estate title insurance companies, whose business it is to furnish such searches; the certificates taking the form of policies of title insurance, permanent in their nature and trustworthy. Such companies have been able to compete for this business, making money for themselves, and, at the same time, providing their patrons with certificates which have thus far proven entirely satisfactory.

3. The scope of this chapter has to do with searches and abstracts made by the lawyer, followed by his certificate and opinion thereon. While he may also

<sup>1</sup> *Owen v. Western Savings Fund*, 97 Pa. St. Rep. 47.

use the official searches, or the title companies' policies—and the cautious lawyer would prefer to be thus relieved from personal responsibility—the intention is to here describe his work of this nature, were he to do it all himself. Writing for all parts of the country, the author has found it impossible to cover every question which may be raised in every state; but it has been his purpose, so far as he could do so, to give in a general way the usual requirements for the search of a real-estate title. To that which is here given the reader can add anything else made necessary by the statutes or practice of his own state.

**§ 137. The elements of a recorded title.**—Generally speaking, the work of a search can be divided into two classes: the title to the land, and the liens or encumbrances against it. A consideration of the former is the object of this and the three succeeding sections, the nine sections following being devoted to liens and encumbrances. In making a search and giving the chain of title, it is usual, and generally more convenient, to commence with the owner at the time of the investigation, and to trace his title back through the successive owners of the land.

As a caption to the abstract, a description of the land to be searched is first given; then begin with the last grantee and find his deed of record, and examine the following items, making full notes:

1. The name of the grantor. As he will be the grantee in the next preceding deed it is important to know that his name exactly corresponds with the one given in that conveyance. In these days of many similar names it is of great importance to know that

the correct person has been secured. It is impossible where the name is common (*e. g.*, John Smith) to be sure of this, but some assistance can be had from his residence, given in the deed, and, possibly, from outside sources. Again, it must be known that the grantor was unmarried, if he alone sign. Here, also, in the absence of proof *aliunde*, difficulties may arise, to be guarded against so far as is possible.

2. The date of the deed and its acknowledgment. Delivery being essential to give it effect, it will be presumed to have been delivered as of its date, excepting that if the acknowledgment be on another day that will control, in the absence of proof to the contrary,

3. The nature of the deed. Whether an indenture, deed poll, quit-claim, release, etc.

4. The consideration. Noting particularly if it be other than a money consideration, *e. g.*, love and affection, exchange of properties, covenants to be performed by the grantee, etc.

5. The description of the land conveyed. This should be carefully compared with the description of the property being searched as given in the caption. If the latter be but a part of that conveyed by the deed the services of a surveyor may be required to determine the exact location. The recitals in the deed may furnish a clue to the identity of the land, and sometimes form almost the only means of identification.

6. The nature and extent of the grant. Here, it must be observed whether the deed conveys an estate in fee-simple, or for life, or for years, etc. For the first it must contain the words of inheritance, "his

heirs and assigns forever." Also, all reservations, exceptions, restrictions, trusts, and conditions should be carefully noted and abstracted. The rights of the grantee in any adjoining street or road, or right of way over adjacent lands, should also be noticed and briefed.

7. The covenants of title or warranty. Whether general and against the world, or special and limited to the grantor and his heirs.

8. The signatures to the deed. Noting if it be signed by all the grantors, and joined by their wives, if they are married. Also, if the deed is made by an attorney-in-fact, trustee, executor, etc., that it is signed in such representative capacity, and that the full power to execute it is set forth in the deed itself, and if not, full proof of such power is to be discovered. This can be searched for, in the case of an agent's deed, in the record of powers of attorney; of an executor, in the will of the testator dying seized of the land; of an administrator, guardian, assignee, or executor without testamentary power, in an order of the proper court conferring that authority; and of a trustee, in the will or deed granting him that power. It is essential that the person executing a deed as the representative of another shall have full power therefor, and to be sure of this a careful examination of the authority must be had and a comparison with the law regulating the right to make the conveyance. The power under which such a deed is made should be carefully noted in the abstract.

9. The witnesses and seals. Observing that the former are of the number, and the latter in the form, required by law.

10. The acknowledgment. This should be in the statutory form and must contain all its requisites; thus, that it has been taken by a proper officer, and, when so required by law, that his official character is certified by the proper authority, usually the clerk of the court having official knowledge of his character.

11. The record. Here should be noted its volume and page.

**§ 138. Continuation of the search of title.**—The investigation of the title of the last grantee completed, and an assurance that thus far the title is good, the abstractor proceeds to examine the conveyance to the grantor named in the deed first searched, observing the same matters, and noting them in his brief. In like manner he then carries back the search for a period of fifty years or more; continuing it, if possible, to the grant from the state or national government.

He will find it of value to thoroughly learn the system of recording and indexing adopted in the offices where he is to search before he commences his abstract work, as his labors will thereby be much lightened. In time he will accumulate in his office briefs of title, or former notes, of material assistance in his later searches; for after a few late deeds he may run into a title he has already gone over, and may thus save the necessity of duplicating his work.

**§ 139. Various modes of acquiring title.**—Not always will the land records contain the complete chain of title, and the search there may come to an abrupt end. This, because some of the deeds may not have been recorded, in which case they must be

looked up elsewhere; or for the reason that a recorded deed may not be the means whereby a grantor holds the land.

It is to be remembered that title to real estate can be evidenced in more ways than by deed recorded in the land offices; thus:

1. A grant from the state or national government may not, necessarily, be entered among the records required for ordinary deeds, and the searches for such muniments of title may be needed to be had in other offices.

2. Title by descent may be very difficult to search, as any record of administration of the ancestor's estate may be wanting, and still the heirs may hold the property as firmly as if by deed recorded in their names. For proof of such a title, in the absence of any record in the probate or surrogate's offices, or in the orphans' court (as they are variously called), resort may be required to be had to evidence *in pais* to show the descent; of necessity, a very dangerous method of establishing a title.

3. When the title is by will, the language of the testament must be carefully noted to ascertain the terms of the devise; whether it be in fee-simple or for life, or the like, or absolute, or upon uses and trusts, or subject to conditions. So, also, must it be certain that the will appears to be correct on its face, and that it has been properly probated. It must also be known if the will has been declared void; a fact which would probably not appear upon the record of its probate, and would require a search among the records of the proper court. Again, in all cases of title by will or descent, it must be ascertained if

the land has been subsequently sold in payment of the debts of the ancestor, or is still subject thereto ; again requiring search among other records, and, possibly, evidence *in pais*.

4. Title by partition proceedings may have come through an action in court, without any record thereof in the land office ; although this could only happen when the party being searched was formerly one of the tenants in common, either by deed, descent, or will, and now owns all the land. To find such a title reference may be required to the records of those courts ; and in such searches assistance may be had from references and recitals in some of the later deeds.

5. Proof of title by adverse possession, like that of title by descent, must be determined by facts. Such evidence should be carefully compared with the common law and statutory requirements for adverse possession, and if any of their essentials are found wanting the title falls. One of the most important of these is that title can not be acquired in this way against any persons under disabilities, such as infants or lunatics.

6. There are two other methods by which title can be acquired, and, in some of the states, without any record in the usual recording offices. These are judicial and tax sales ; the only required record thereof, in such states, being in the office of the clerk of the court or the collector of taxes.

§ 140. **Adverse conveyances.**—The chain of title found to be complete in the various grantees down to the owner then being searched, to perfect the abstract, and before searching for encumbrances, it is neces-

sary to be sure that no transfers of the land have been made by any of the grantors outside of those contained in the brief, such transfers being called adverse conveyances. This can only be ascertained by searching for other conveyances of the same land out of the several grantors, from a period before to a date subsequent to the record of the deeds to their grantees; and, if the statutes permit any length of time for recording, then to a date posterior to such limitations, the result of such searches being shown in the brief of title.

§ 141. **Mortgages.**—The chain of title found to be perfect, and without adverse conveyances, a search for encumbrances now follows. These are to be examined against all the owners of the land noted in the brief, within the time limited by law for their continuance as liens.

First among the encumbrances to be looked for are mortgages; usually to be found in the same office where the deeds are recorded. This search should be commenced from the day before the date of the conveyance to the grantee, to a date covering the time within which any statute permits a mortgage to be entered to become a lien by being recorded. For example, in some of the states preference is given to a mortgage to secure a balance of purchase-money, which may be recorded within a time limited by such statutes, and during that period is a lien, although not entered for record. Where, as is generally the case, the lien of a mortgage is from its record, that should be the date noted in the brief, rather than that of the mortgage itself, excepting in the special cases

regulated by statute, one of those exceptions, and, possibly, the only one, being that above given.

**§ 142. Judgments.**—In some of the states, judgments are liens only as against prior acquired lands, and not against those subsequently purchased, unless the judgment has been revived since such later conveyances. In other states, a judgment is a lien against after-acquired property, without continuation or revival. Again, in some states, judgments entered against an owner of land do not remain a lien thereon, as against subsequent purchasers, unless revived within a certain number of years against such purchasers; there called *terre tenants*. So, again, the period of the duration of the lien of a judgment is variously limited by statute, even as against the judgment debtor himself. All this, as well as other questions concerning judgments, show that a thorough knowledge of the statutes and decisions of his state regulating liens is essential to the lawyer before he can make a proper search and abstract. Judgment searches should be made in all courts of record where the entry of a judgment would bind the land, including the United States courts in all districts of the state.

**§ 143. Mechanics' Liens.**—The right to file mechanics' liens is given only by statute, and their extent, and the time within which they can be entered, are regulated thereby. In some states, the property may still be subject to these liens, although not entered of record; such are cases where they can be filed within a determined period from the date of the last item furnished the building, and relate back to

its commencement; in such instances, parol evidence may be necessary to complete the search.

§ 144. **Public liens.**—Public liens are those created by a municipality; such as for pavements, sewers, water, gas, etc., generally, taking precedence over all other encumbrances. Their validity requires that their assessment should be made in accordance with law, and that they are properly entered of record. They may not be entered in the offices where other liens are to be found, and searches may be required in the municipal offices, or wherever the law may provide that they are to be recorded.

§ 145. **Taxes.**—Taxes must always be searched for, and, like public liens, depend upon assessment and record entry. In the absence of an agreement between the parties, the grantor is liable for all taxes assessed against the property before the date of his sale; the date of the assessment being the time of the commencement of their lien. So, for the current year, the purchaser would be liable for the payment of all taxes assessed after his purchase, in the absence of a statute or an express agreement to the contrary.

§ 146. **Attachments.**—Attachments usually bind the land against which they are issued, and must also be searched for. The most common form is that of a foreign attachment, issued against a non-resident debtor of the state where his land is situated. Generally, attachments are entered of record in the same courts where ordinary judgments are found, and, usually, are indexed with them. As an attachment is a proceeding *in rem*, and only the property attached is bound, a description thereof must be in-

cluded in the record of that proceeding, which will be void unless it follows the statutory requirements.

**§ 147. *Lis pendens*.**—By the term *lis pendens* it is intended to include actions of ejectment; proceedings in equity to enforce trusts; suits for specific performance of agreements concerning lands; process praying a decree for the payment of money charged on land; bills to quiet title, etc. All of these are in the nature of encumbrances, and must be included in the searches.

**§ 148. *Decedents' debts*.**—By statute, in most of the states, the lien of the debts of a decedent is continued against his real estate for a certain number of years after his death, and, during that period, will bind his lands without entry of record. The evidence of such debts may need to be discovered from other sources than the record, but title coming from the heirs, or legal representatives, of a decedent, can not be certified to be clear of encumbrances until it is known that such liens do not exist.

**§ 149. *Other encumbrances*.**—There may be still further searches to be made than those to which we have referred, but that can be determined by the statutory law of the state where the land is situated. The attempt has been made, in a general way, to cover the chief subjects of a search for encumbrances upon real estate. It is one of the most difficult parts of the work of examining a title, and the lawyer is safer if he depend upon official searches against liens, rather than to himself run the risk of personal liability in certifying them.

**§ 150. *Exceptions to a certified abstract of title*.**—With all the care of the abstractor—and our but

cursory review of his labors points out many of the difficulties with which he meets—he may still be unable to give a perfect abstract of title and certificate of encumbrances. At least two matters can not be absolutely guarded against, excepting with more labor than it is possible to give to any search.

*First.* The indexes may have omitted a conveyance, mortgage, judgment, etc., affecting the property. Searches are, necessarily, made from the indexes, because in most public offices it would be a task too difficult to perform to search all of the records themselves. Indexes are usually accurate, but that can not always be assured.

*Second.* The grantors or grantees, although bearing precisely the same name, may not be the identical persons named in the conveyances noted in the abstract, or included in the lien search. Again, names when spoken may be very similar to the ear, but quite different in the manner in which they are written. Thus, the German name Kuntz has easily been reduced to Koons, and still further anglicized into Coons. Many other names will suggest themselves to the reader as coming within this rule of *idem sonans*, all of which will illustrate the point we make, which is that no search would be perfect unless it included all the names of the same sound, because, as we have said, foreign names not always being spelled alike when brought to American shores, careless or ignorant clerks may have made serious mistakes in including them in the indexes of their records. That such a search would be next to impossible is evident.

If, therefore, a certificate is required to an abstract

of title, two things should always be excepted : the accuracy of the indexes, and the identity of the grantors and grantees named in the conveyances.

When the abstract is finished and ready for delivery to the client it should be dated, and show for whom it is made. The notes of the searches should be carefully preserved, as they will often be found very useful in making subsequent abstracts, which may go over a part of the same ground.

## CHAPTER XVI.

### SETTLING ESTATES OF DECEDENTS AND INSOLVENTS.

- § 151. Settling estates.
- 152. Decedents' estates.
- 153. Insolvent's estates.
- 154. Trustees, guardians, etc.

**§ 151. Settling estates.**—While the labor required in winding up the estates of decedents and insolvents is not necessarily professional work, the assistance of the lawyer is usually required. Sometimes the attorney himself is the executor or administrator of the decedent's estate, or is the assignee of the insolvent; however, it is not proposed to discuss any of the duties which may there be required of him, as not forming a part of his professional services, but, rather, to make some reference to the legal assistance rendered clients who are in charge of the settlement of estates. This is a very lucrative part of the lawyer's office work, and also has the advantage of readily bringing him his fees, as he is assured their payment out of the funds in his client's hands.

**§ 152. Decedents' estates.**—An outline of professional services in the estate of a decedent would include the proper probate of the will of a testator, and the grant of letters testamentary to his executors, or of letters of administration on the estate of an intestate. Administration is usually granted to the fol-

lowing persons, and in this order: the widow, a son, a daughter, one interested in the estate as an heir, a creditor, or a fit person. The probate judge, the register of wills, the surrogate, or whoever may have this official duty, has discretionary power in granting administration, generally, however, within the lines and in the order named. If the widow is competent, she is first entitled, and no other can be appointed without her renunciation first had. As between children, heirs and creditors the discretion of the officer in granting letters is usually final. Failing all these he may select a proper person to administer the decedent's personal estate. Letters granted, public notice thereof should be given, followed by an inventory and appraisement of the estate, filed with such a bond as is required by law. The administrator must remember that he has no control over the real estate of the decedent without a special order of court, nor has an executor, in the absence of power in the will.

The services of the lawyer are, in the main, required in advising and directing those in charge of the estate. The statute law regulating the settlement and distribution of estates is usually well defined, and there should be little difficulty in guiding aright the executor or administrator. The first duty of the counsel is to see to it that his client does not render himself personally responsible. To do this an order of court should be obtained in all doubtful cases, if it can be had, or the written consent of all parties interested in the estate. The property of the decedent, coming into the hands of the executor or administrator, being ready for distribution, it is his

duty to file an account in the proper office. This account should either be drawn by the lawyer, or passed upon by him before its completion. It should be a complete record of the administration of the estate, showing the receipt and disbursement of all moneys, and the balance in the hands of the accountant. The account being confirmed by the proper court, the balance distributed, and the duties of the executor or administrator finished, it remains for the attorney to have him finally discharged from his office and his responsibility thereunder ended.

§ 153. **Insolvents' estates.**—The duties of the lawyer do not materially differ in advising the representatives of the estates of insolvents from those connected with the administration of decedents' estates. Frequently he is also the attorney for the insolvent himself, because his client would not likely select an assignee inimicable to himself, nor one who would not employ his own attorney. Therefore, his legal services usually begin with the preparation of the deed of assignment, followed by its entry of record in the proper office, public notice, inventory, and bond. Like the case of the executor or administrator, the assignee needs to be guided by his lawyer, and to be prevented from incurring personal responsibility. His accounts should be properly prepared, and, in every respect, the requirements of the insolvent laws strictly followed.

The chief difference between an assignee and a receiver is that the former is chosen by and represents the assignor, although in trust for his creditors, while the latter is appointed by and is an officer of the court. Receivers are usually appointed to operate

the business or to sell out and dispose of the property of insolvent corporations. The counsel for the receiver of a large corporation has a very responsible professional employment, but one usually very profitable. Such positions are not likely to come to the beginner at the bar, but he may have connection with such matters as junior counsel, and, in time, himself have such an excellent client. At all events, he must know that such duties are included within the office work of the lawyer, and are by no means the least desirable.

**§ 154. Trustees, guardians, etc.**—It is unnecessary to make any reference to professional services rendered to trustees, guardians, etc., beyond the statement that sound professional advice is required, and good business judgment is needed in safely guiding such clients. It is well to advise a guardian, upon the termination of his ward's minority, to obtain his approval of all that has been done in preserving his estate, for the purpose of saving future criticism. Ethically, the guardian of a minor occupies a much more responsible position than does any other trustee. He acts for one who is incapable of managing his own affairs, and needs not only professional care, but, also, that interest in his affairs which should be given by one who endeavors to do more than his duty, indeed, as much as, if not more, than he would exercise in the care of his own business.

## CHAPTER XVII.

### FORMATION AND PROFESSIONAL CARE OF CORPORATIONS.

- § 155. Corporation clients.
- 156. Preparing corporation charters, by-laws, etc.
- 157. Professional care of a corporation.

**§ 155. Corporation clients.**—In these modern days of combinations and organizations of capital a corporation clientage forms no small part of the successful lawyer's office work. It is not only directly valuable, but has the indirect advantage of usually drawing the private business of its officers and employes, as well as giving the lawyer a local reputation of value. The young lawyer can not expect to be favored with such a clientage at the outset, but he will be wise if he give some attention to corporation law, and, so far as he can, familiarize himself with its forms and practice, so that he may be prepared to care for that class of business when it comes to him.

**§ 156. Preparing corporation charters, by-laws, etc.**—Preparing the charter of a corporation is not, as a rule, a matter of much difficulty, as in nearly all the states their incorporation has been much simplified and facilitated by general laws. Probably the most important portion, and that requiring

the use of careful and precise language, is in naming and describing its corporate powers. There are charters which, necessarily, must require the exercise of the lawyer's highest skill and ability; but in all, general or special, the labor is of a class which usually receives a satisfactory compensation. It is worthy of suggestion that when the perfected charter is turned over to the new corporation, it should be accompanied by a draft of the by-laws for the approval of the stockholders. There are other preliminary matters which might properly receive the attention of the attorney, such as the proper organization of the company, their first minutes, etc., in which his services will be appreciated. Very frequently the stockholders of a new corporation come together without any knowledge of the proper mode of organization. If the attorney who drew their charter is then able to guide them in this he is likely to be selected as their permanent solicitor.

There are instruments connected with the legal business of a corporation for which their preparation will demand the exercise of superior skill. For example, the mortgage of a corporation securing an issue of its bonds will require the best legal talent of the lawyer, and a perfection in that line will necessitate a thorough knowledge of the forms needed to cover all the questions properly to be included in such a mortgage.

**§ 157. Professional care of a corporation.**—The professional care of the corporations of any locality can usually be found intrusted to the leaders of its bar. The legal affairs of a corporation are often intricate and difficult, and their successful conduct

will require both legal learning and, as well, tact and good judgment. In the trial of cases their solicitor must remember that prejudices against such clients are likely to be raised with the jury, and that at the hands of the "ancient twelve" a corporation is not always sure of equal and exact justice. Why it is that a few men associated together in a legitimate business under the form of a corporation should not receive the same consideration as would others doing a similar business as copartners, is an inquiry which can be answered in several ways, but the plain fact remains that the distinction does exist, and is often unjustly applied. It is in the management of such cases, particularly in keeping them away from the opportunity of a jury to act unjustly, that the solicitor of a corporation needs to exercise his skill and tact.

## CHAPTER XVIII.

### COLLECTION OF CLAIMS.

- § 158. The beginner's business usually that of collecting claims.
- 159. Mercantile collections.
- 160. A thorough system needed in commercial collections.
- 161. Collection and mercantile agencies.
- 162. Published lists of attorneys.
- 163. Rates for collections and division of fees.
- 164. Suggestions for managing collections.

**§ 158. The beginner's business usually that of collecting claims.**—Among the first things the beginner at the bar is called upon to do is the collection of claims. If his duties in that line are faithfully and quickly performed he may expect further professional employment, and, perhaps, secure it more rapidly than he could through any other business he may be called upon to transact at the outset of his practice. His friends will be likely to entrust him with their collections in order to show him a kindness, and, at the same time, to test his professional qualities. If he show promptness and activity in the care of such matters, he can be reasonably sure of other employment, and may win his friends for permanent and regular clients. Again, if he is energetic and trustworthy in such affairs these clients are sure to recommend him to others, and thus materially aid him in his progress. Much of the success of the lawyer de-

pends upon the start he makes in the law. He is sure to have friends who are willing and anxious to aid and advertise him, but he must give them material for their praise by diligently working at the smaller concerns with which he is entrusted. Every successful lawyer, in looking back over his early days, can point to something during his novitiate which gave him a reputation, and started the clientage he afterward secured. That something is, probably, the prompt and diligent attention he gave to some minor business then entrusted to his care by his friends.

**§ 159. Mercantile collections.**—By the term collections is not meant those made by personal solicitation, properly belonging to collectors of small debts and bills, but, rather, to those managed from the office, like claims of wholesale dealers against their retail customers.. In many instances such employment may result in litigation, and from it may grow causes of importance. Many of the claims received for collection are defended by the debtor, and thus contested actions will arise. The client, too, who finds that his mercantile collections receive proper attention from his lawyer, beginner though he may be, will probably give into his care those cases which will require a legal contest. Again, a collection clientage is always lucrative, and is one of the sources providing a steady stream of fees, which, though comparatively small in individual amount, furnish, in the aggregate, a satisfactory compensation. It assists in doing away with the latter part of that “feast or famine” which sometimes describes the lawyer’s income. Where his fees come but occa-

sionally, and then in larger amounts, he will appreciate the opportunity to secure business which will also give him a more continuous and steady revenue.

**§ 160. A thorough system needed in commercial collections.**—Many lawyers, whose professional business is very large in all departments of practice, do not hesitate to accept a collection business, and, by the adoption of a thorough system and careful attention to its demands, thereby secure no small returns. A lawyer in large and general practice may not be able to give his personal attention to the details of his collection business, but he can secure such clerical assistance as may be needed for that purpose, taking into his own charge the conduct of the litigation growing out of that department of his practice. He may have begun with the personal care of the collections of his office, and, by the aid of a perfect office system, have retained that clientage, even though the details are in the hands of his clerks. An ideal law office is one so organized and systematized that all classes of law business, from the greatest of contested cases to the smallest collections, will receive perfect and prompt care and attention. It is not a branch of professional business to be despised at any stage of his career; while a prompt and careful attention to its demands will assure the lawyer at the beginning of his practice, as well as throughout his professional career, clients worth having, and, with them, a good and steady income.

**§ 161. Collection and mercantile agencies.**—In these days, mercantile collections are very largely in the hands of large commercial agencies, who devote

their attention exclusively to this class of work, and seek the services of trustworthy and able lawyers in all parts of the country. Certain lines of trade, also, have agencies who take charge of collections for their members, and for that purpose have representatives at every bar. Many of these agencies choose their correspondents with care, and are able to send them business of value. They have established rates for collections, of which they receive a share, usually one third. They are, generally, well organized and equipped, and furnish valuable and important employment to the attorney. When a correspondent has proven to be prompt and reliable he can be assured of their clientage, and will secure professional employment certain to remain in his office.<sup>1</sup>

<sup>1</sup> Among the important mercantile and collection agencies in the chief cities, many of whom have offices and branches in many parts of the country, are these:

*New York*—R. G. Dun & Co.; North American Mercantile Agency; Attorneys' and Agencies' Association; Gilbert Elliott Law Co.; Snow, Church & Co.; United States Law Association; Equitable Mercantile Agency; J. S. Clayton Law and Collection Agency; Stationers' Board of Trade; Hardware Board of Trade; Jewelers' Board of Trade; National Furniture Association.

*Chicago*—R.G. Dun & Co.; Wilbur Mercantile Agency; Tappan, McKillop & Co.; Martindale Mercantile Agency; Bond's Commercial Agency; Mercantile Law Association; Lumbermen's Credit Association; American Shoe and Leather Trade Association; Jewelers' Association; Furniture Manufacturers' Exchange.

*Philadelphia*—R. G. Dun & Co.; John & C. W. Sparhawk; Wagner & Tschudy; Sharp & Alleman; Brock's Commercial Agency; Guarantee Collection and Law Co.; A. J. & L. J. Bamberger.

*Boston*—Edward Russell & Co.; Farnsworth & Conant; Quimby & Nesbit; Mercantile Law Co.; Reed's Collection and Mercantile Agency; United States Collecting Co.; National Shoe and Leather Exchange.

**§ 162. Published lists of attorneys.**—The lawyer is deluged by applications to insert his name—of course, at some expense—in a great number of lists of attorneys. While it is not considered unprofessional to have his name thus inserted, it is to be remembered that a great majority of these lists are prepared only for the purpose of obtaining the charges paid their publishers by the attorneys, and do not bring sufficient legal business to return the cost of the subscription to the publication. There are a few, however, which the lawyer will be wise to secure, as they include the names and addresses of many prominent lawyers in various parts of the country, and are useful in sending business to places where the subscriber does not have a correspondent. In addition, these books contain a synopsis of the commercial laws of the several states, terms of court, etc., and are useful for such information.<sup>1</sup>

**§ 163. Rates for collections, and division of fees.** It is universally customary to make legal collections, where there is no contest or litigation, at established rates. The collection agencies usually name their

*St. Louis*—R. G. Dun & Co.; Ten Brock Agency; Commercial Lawyers' Association.

*Baltimore*—R. G. Dun & Co.; Shriver, Bartlett & Co.; American Mercantile Law Co.

*San Francisco*—R. G. Dun & Co.; Emmons & Emmons.

<sup>1</sup> Among the entirely reputable lists, and containing the names of lawyers of the highest standing, are the following:

Hubbell's Legal Directory, Hubbell Publishing Co., 309 Broadway, New York; Story's Legal Digest, Mutual Publishing Co., 120 Broadway, New York; Lawyer and Credit Man., 178 Fulton St., New York; Attorneys' and Agencies' Association, 206 Broadway, New York; Sharp & Alleman's Directory, 603 Chestnut St., Philadelphia.

terms when sending claims to their correspondents, as also their expected share of the fees. In the absence of special terms, and as a hint to the beginner when inquired of by his client, this schedule is suggested as fair and customary. On the first \$200 or less, 10 per cent. On the excess of \$200, and not exceeding \$1,000, 5 per cent. On the excess of \$1,000, and not exceeding \$5,000, 3 per cent. On the excess of \$5,000, 2 per cent. No fee to be less than \$3. One-third these fees to the attorney sending the claim. These rates are exclusive of costs, disbursements and expenses, and do not relate to contested cases.

**§ 164. Suggestions for managing collections.—** The faithful and successful performance of this department of the lawyer's practice requires tact, good judgment, prompt and careful attention, and the immediate remittance of all moneys collected. The slothful lawyer, and, particularly, the one who is dilatory in paying over his client's money, can not expect to secure any business in this direction, or, for that matter, in any other branch of his profession. Addressing the novitiate on this subject, this could be said to him. When you receive a collection at once acknowledge its receipt to the client, attorney or agency from whence it came, stating the prospects of success, and that the matter will have your prompt and thorough attention ; adding, if in your opinion immediate steps are necessary to secure the money, a statement of the probable amount of costs required, with a request for its remittance, accompanied by such *prima facie* proof as is necessary to obtain judgment by default. As soon as this is done notify the

debtor that the claim is in your hands for collection, and that prompt payment to you will be necessary to save costs of suit. Keep after the debtor until you are satisfied it can not be secured, or collected, when it should be at once returned to the party from whom you have received it, stating that it is uncollectible by law or persuasion. In the terse language of the motto of a western commercial agency: "Make things happen lively." Keep your client, or correspondent, fully advised of all you do in the case, and when you have obtained the money send it to him by the first mail. Under no circumstances, without your correspondent's consent, should you have any communication with his client; you represent the client only for another, and both courtesy and professional duty require you to deal with the correspondent alone. In another place we have discussed the system of an office, including dockets, the proper mode of filing papers, etc., giving suggestions facilitating the management of collections.<sup>1</sup>

Chapter IX, §§ 96-100.



## PART III. PREPARATION OF CAUSES AND PROCEDURE

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### CHAPTER XIX.

#### THE ADVOCATE, AND PREPARATION OF HIS CASES.

- § 165. Prominence of the trial lawyer.
- 166. Thorough preparation of a cause is essential.
- 167. Value of early preparation.
- 168. Division of the preparation into the facts and the law of the case.

§ 165. **Prominence of the trial lawyer.**—While it is true, as we have before said, that the practitioner's income may be more largely derived from his office work, yet, it is equally certain that he acquires fame more rapidly, and secures professional advancement as certainly through success in the courts, where he is more prominently brought before the public, than from the less conspicuous course of his office duties. A knowledge of the characteristics of the members of every bar will show some who excel in the performance of the former class, while others are more successful in the trial of causes; a division in the profession brought about by education, aptitude for their chosen fields, or, possibly, by fortuitous circumstances; but the really great and successful lawyer is the one who excels in both these depart-

ments of practice, and is as well fitted to accomplish the business of his office as he is to try his client's causes.

**§ 166. Thorough preparation of a cause is essential.**—While the desired end of an action at law is a verdict for the client, it must be remembered that the chief means to that end lie in the thorough preparation of a case. A cause well prepared for trial is more sure of ultimate success than one, of perhaps greater strength in law, or fact, not so thoroughly understood by counsel, or made ready for exposition to the court and jury. It is, therefore, all-important that the advocate should have mastered his case in every detail before bringing it to trial, and that his thorough knowledge of it should extend to every question of law to be raised and of fact to be proven. It is true, without exception, that no lawyer can become eminent in his profession without great labor. His prominence depends upon his success, and that success can only be secured as the reward of unceasing toil. Nowhere is labor more demanded than in the preparation of a case. No stone should be left unturned, no root permitted to remain undisturbed, no portion of the earth unsifted, until the entire field of the cause has been brought to a state of cultivation so high that its successful harvest is assured. If so unfortunate as to meet with defeat, the lawyer should feel sure that it was not caused by his lack of preparation or want of his mastery of the case.

**§ 167. Value of early preparation.**—It is important that the advocate should prepare a case at the time of its inception, and as soon as he is retained ; then it

is fresh in the minds of the client and of his witnesses, as well as of himself, and he is better able to master the situation than when the case has become stale, and, possibly, some of its salient points may have been forgotten. Thus he will always be ready for trial, and more readily enabled to understand and cope with any questions which may arise before it is called for hearing. The pleadings of a cause can not be properly drawn without a previous preparation of the facts and law applicable to the case, while anything arising before trial, either in the way of the record, or an argument upon any of its questions, can best be disposed of after a thorough knowledge of the whole case. Again, the advocate is always ready against any accident which may occur to prevent a preparation of the cause at any later stage of the proceedings.

It is admitted that it is more irksome to prepare a case at the outset of the employment than when aided by the spur of necessity given by the near advent of the trial ; yet, none the less should it have this timely attention. If for no other reason, it is important that the case should be mastered before the suit is commenced, or the client advised to resist another's action, in order that he may refrain from litigation in which he is not reasonably sure of success. There are lawyers who bring actions and advise their clients to defend without preparing their cases at the outset, deferring that work, through sloth or negligence, until the eve of trial ; but it is certain that such lawyers are not the successful practitioners at the bar ; while, on the contrary, those who are early

and always prepared, will rapidly acquire foremost places in their profession.

This early preparation should be supplemented by a thorough revision before trial, going over the work and carefully revising and correcting the briefs of law and fact, interviewing the witnesses, and requiring them to refresh their memories on the subjects in which they are to be examined, and adding to the list of authorities on the brief all the latest decisions.

**§ 168. Division of the preparation into the facts and the law of the case.**—As to their manner of trial, causes resolve themselves into two classes: those to be tried before juries, and those to be argued before the court alone, or before referees, masters, auditors, etc.; but it is not necessary to observe that distinction in a discussion of the proper mode of preparation, as all that is said of the former will equally cover the latter class. The two subjects into which the preparation of a cause properly fall are those of the facts to be proven, and the law applicable to the case. That preparation, together with some consideration of the preliminaries of procedure and process, such as choosing the remedy, and the forum, bringing the action, pleading, precautionary measures, preliminary steps, etc., will form the subjects of this part of our work.

## CHAPTER XX.

### PREPARING THE EVIDENCE.

- § 169. Know all the facts of the case.
- 170. Examination of the client.
- 171. Value of an early examination of the witnesses.
- 172. The examination of the witnesses.
- 173. Secure facts, rather than inferences.
- 174. Cautioning witnesses.
- 175. Training witnesses.
- 176. Training the witnesses for cross-examination.
- 177. Witnesses must not be influenced.
- 178. Honest witnesses are the best.
- 179. Witnesses' characteristics and temperaments must be studied.
- 180. Clients' and witnesses' general reputation and character.
- 181. Statements of witnesses usually stronger than their testimony at trial.
- 182. Documentary proof.
- 183. Construing writings.
- 184. Maps, plans, etc.
- 185. Digesting the evidence—Ascertaining the strong points.
- 186. Arranging the evidence.
- 187. The probabilities of facts.
- 188. The brief of the facts.
- 189. Chitty's rules for preparing the brief of facts.

§ 169. **Know all the facts of the case.**—The bones and sinews of every case are its facts, and the first step is to master them in every detail. They must be studied in their depth and breadth, and in the relation which they bear to each other. Often, that

which at first sight may appear to be trivial and of but little moment may be found at trial to be of controlling importance. Little matters often control great things, and, on reviewing a case after trial, it will frequently be found that it has turned upon some fact which had not at first been considered of much importance. The effect of the evidence is that which is to be secured, and one must remember that the jury will often draw their inferences from facts which are not prominently brought out, or which counsel may have overlooked; hence, the skillful advocate will bring to their attention some minor detail from which he can show the strength of the case. Of course, the salient points of the cause must be thoroughly in hand; nevertheless, side lights or small details are frequently of controlling influence.

The chief object of an investigation of the facts is to secure those which rule the case, and they are often gained more by inference than by direct testimony. From a number of particulars inferences are gained; those particulars must, therefore, be mastered and in such a manner, and under such a well-ordered plan, that their presentation as evidence will throw out clearly and distinctly the conclusions to be drawn. Thus, the strength of the facts are presented, and thus their influence is had upon the cause. In another part of this work, in discussing the proper argument of a case before the jury, reference is made to the value of probabilities in showing the strength or weakness of facts.<sup>1</sup> To avoid repetition this subject is not enlarged upon here, although it is

<sup>1</sup> Chapter XXXVI, §§ 375, 376.

of equal importance in preparing the evidence of a cause.

**§ 170. Examination of the client.**—The client must be examined and cross-examined with the utmost thoroughness, in order to elicit every fact and circumstance relating to the action, as also with respect to its every detail of evidence and question of law involved. There will be many subjects upon which the client will remain silent, either from neglect or through ignorance of their importance; for these reasons it devolves upon his counsel to draw from him every bit of testimony bearing upon the case, or necessary to its thorough understanding, and all that he says should be noted in the brief of facts, and read over to him at its completion.

His attention should not only be directed to the strong positions, but as well to the weak points in his case, as also to the places where he may expect the severest cross-examination from the opposing counsel. Such an examination is well conducted only when it brings out both the strength and weakness of the client and of his cause. A foreknowledge of his peculiarities provides against a surprise at trial, while a familiarity with the weak points of his case is absolutely essential to its proper preparation. It can be assumed that each side of every case has its weak as well as its strong positions; the careful advocate is the one who becomes familiar with them all before trial, and is prepared to defend the weakness of his own side, as well as to present its well fortified propositions.

This consultation with the client should be had in the absence of his witnesses, for in pointing out to

him the weakness of his case, and the dangers lying in the way of success, in the presence of his witnesses, the apparent fear of the result shown by counsel might tend to weaken their belief in the justice of the client's cause, and prevent them from giving their entire knowledge of the facts. Before sending for his witnesses the client should give an outline of all that he expects to prove by them, so that the lawyer may the more readily ascertain their knowledge of the case, and be prepared to secure their testimony.

**§ 171. Value of an early examination of the witnesses.**—There are cases where it may be necessary to proceed upon the information given by the client alone; but, when it can be had, there should be an early consultation with his witnesses, and before the action is commenced. It not only gives the lawyer a better understanding of the case, and assists him in coming to a more certain knowledge of the advisability of bringing the action, but it often points out a history of the case nearer to the truth of the matter, and one less hampered by the prejudices of the client. Mr. Chitty adds another cogent reason for this early examination, in suggesting that a minute inquiry into the facts and evidence made in the first instance, and before the defendant is warned of the litigation, produces a truer disclosure of the testimony of the witnesses than if the defendant has had an opportunity to caution his neighbors and friends from making any communications adverse to his interests.<sup>1</sup>

Again, the witnesses get nearer to the actual facts

<sup>1</sup> 3 Chitty's General Practice, 118.

if asked their information when the occurrence is not remote from the time of their examination. Memories of past events are apt to fade, and, particularly, is this true of the precise words used in a conversation, and which may be most important to the success of the cause. Notes made at the preliminary examination will also greatly refresh their recollections when they are re-examined immediately before the trial. The advocate, too, is benefited by an early knowledge of the facts. Those of recent occurrence excite the perceptive faculties, and increase the extent and ardor in a higher degree than do things long past. The experienced lawyer will admit that the second trial of a cause does not arouse the same interest as it did when it was first tried. This is partly by reason of the distance between the actual occurrence of the facts and their presentation to the jury. Every practitioner more enjoys and better tries fresh cases, and concerning late events.

**§ 172. The examination of the witnesses.**—It is well to have the consultation with the witnesses collectively, or, at least, those should be examined together who are to testify upon the same subject. One may assist another with his recollections upon some material matter, or, what is equally valuable, may correct him if he should fall into an error. It is well to start off with the witness whose testimony is believed to be the strongest, as his evidence will have no little influence upon the others, and may very materially strengthen their recollections of the facts. As with the client, so with his witnesses, they should be thoroughly examined and cross-examined to elicit all their information upon the sub-

ject; full notes being made of all they say, so far as possible in their own language, adding with care precise dates, amounts and forms of expression material to the case. When completed, the notes should be read to the witnesses, obtaining, if possible, their signatures to attest their correctness.

**§ 173. Secure facts, rather than inferences.**—The duty of the advocate is to draw from the witnesses all the facts of which they have knowledge. He must seek the facts and not the inferences of the witnesses. They will be prone to give their theories or conclusions, but that will not be admissible at trial, and must be checked in the examination. It is more than the simple fact that is needed. Alone, it may seem to be improbable or untrue, and hence, all the surrounding circumstances must be brought out, for such incidents often prove the main fact to be true. It has been well said that “a witness disbelieved is a witness against you, which is almost as good as two on a division.”<sup>1</sup> At trial it may be questioned if the witness could have remembered the central fact, but if he can give the surrounding circumstances and incidents the reason for his memory may be apparent. Again, the details of the minor events may strengthen the memory of the witness as to the important fact. One circumstance may be so united with another that the recollection of one may bring out the other. To secure these facts the examiner will do well to take up the thread of the story in the order of its occurrence, and thus the witness may be able to refresh his recollection. It is a skilled art to

<sup>1</sup> Harris' *Before and After Trial*, 64.

do this successfully, but it is one of great value to the trial lawyer.

§ 174. **Cautioning witnesses.**—There are witnesses and witnesses. Some make a very unfavorable impression when on the stand, although the facts to which they are to testify may be well known to them. Those of good appearance and pleasing manner will command more respect and better secure the attention of the court and jury than those of opposite externals. For this reason, when counsel has a choice of witnesses, those should be selected who will have the most influence by their appearance and demeanor. If such a selection can not be made the advocate is justified in suggesting to his witnesses the advisability of making as good a show as they can when called to testify. So must they be warned to avoid a certain forwardness or flippancy that some men exhibit in public; to speak in a voice that can be heard, and to lay aside any unnecessary timidity or hesitation. In line with this last suggestion, those who are unaccustomed to the court room should be given some opportunity before the trial to observe the manner in which witnesses are examined, in order that they may not be entire strangers to the forum when they are called.

§ 175. **Training witnesses.**—Not only must the witnesses be taught the value of externals, but they should also be trained as to the method and manner of their examination and cross-examination. They must learn to exercise caution and forethought in their answers; to reply to the questions put to them only when they are understood, and then to take sufficient time to answer properly. So, also, must they

be cautioned to follow in the line of the strictest truth and accuracy. Witnesses, though honest, are often apt to indulge in extravagant ideas, and to draw upon too fertile an imagination. Thus, in describing values, time, distance, speed, etc., some witnesses will make statements which on their face are untrue. The loss of belief in one part of the testimony of a witness is likely to reduce the credibility the jury will accord to all he may say. It can be safely said that witnesses who are careful in their estimates, and conservative in their statements, make the best impression both upon the court and jury, and correspondingly add strength to the side for which they are called.

**§ 176. Training the witnesses for cross-examination.**—Particularly must the witness be trained to endure cross-examination. It is the most difficult ordeal through which he is to pass, and he should be prepared to meet it. To that end it is well to cross-examine him at the private interview with as much severity as he is likely to encounter in court, as thereby he will be somewhat inured to the examination of the opponent, and may also disclose weaknesses in his testimony against which the advocate needs to be forewarned.

Those who are inexperienced in litigation will sometimes think they have the most difficult part of the controversy when subjected to the cross-examination of a skilled advocate. If such a witness would remember that he has by far the easier task of the two, and that he can probably remain the master of the field if he will preserve his equanimity, stick to the exact truth, and not permit his adversary to trip

him by questions he does not understand, he will be much assisted, and, perhaps, relieved from his embarrassment.

An able writer has thus well advised the witness : “ He must be warned that the exterior ferocity of his future adversary will be apparent only, and that his smiling friendliness is far more to be dreaded than his snarl. If not of ready wit, he must be taught to watch the questions narrowly, to reply cautiously and in as brief and apt a sentence as is possible, to beware of committing himself on any point as to which he is not entirely sure, and never to attempt to explain or reconcile any asserted or suspected inconsistency in his evidence until requested to do so by his own counsel. \* \* \*

“ A quick-witted and courageous witness needs a different preparation. He is not deceived by either frowns or smiles, and the principal effect upon him of the examination to which he is subjected, is to foment in him a desire to have an equal hand in the forensic duel. For this purpose he should be provided with the proper weapons. So far as the questions of the adversary can be foreseen or conjectured, his answers to them should be selected with a view to give the most effectual aid to his own side of the cause, and as far as possible to destroy the enemy. Important matters, which can not be in any other manner introduced, may thus be brought to the attention of the jury, to the confusion of the questioner and the advantage of the cause; and if the witness be exceptionally able, this preparation may extend so far as to include a plan of answers which shall lead the adversary into questions that will open evidence

otherwise inadmissible, and result in disclosures of the most damaging and even fatal character.”<sup>1</sup>

**§ 177. Witnesses must not be influenced.**—Not only is it a moral wrong, and a violation of professional ethics, to influence the testimony of a witness, or to seek to secure from him a false color to his evidence, or an exaggeration, but it is also a matter of very bad policy; such a witness is very likely to break when on the stand, and will thus materially injure the cause for which he is called. Nor can a man of honor argue a case with his full strength if he feel that all of his evidence is not actually truthful. To win a cause the advocate must be sure in his own mind that he has right and justice on his side. They are colleagues whose assistance is most powerful.

On the subject of the evils of coaching witnesses Mr. Chitty says: “Every honorable practitioner, at all events, will take care that no part of his own or his client’s intercourse with the witness can possibly have the least influence upon him to give his testimony otherwise than strictly according to the truth and without evincing the slightest partiality to either party. Indeed, in prudence and policy, this is of the utmost importance to the client’s interests, because the least improper interference with a witness might so disgust a jury as to induce them to find a verdict against the client, although law and justice might, on the whole, be in his favor.”<sup>2</sup>

To this, other writers have properly added: “If it appears to the jury that one witness has been cor-

<sup>1</sup> Robinson’s Forensic Oratory, § 183.

<sup>2</sup> 3 Chitty’s General Practice, 825.

ruptly tampered with, a suspicion is engendered against both client and counsel that it is very difficult to remove, and, indeed, one that it is often impossible to displace. The jurors reason that, if one witness has been corruptly influenced, others have also been probably tampered with, and a feeling akin to anger is aroused which works infinite mischief, for jurors, like other men, quickly become indignant if it appears to them that there has been an effort to impose upon them.”<sup>1</sup>

**§ 178. Honest witnesses are the best.**—Experience will prove that honest witnesses—proven by the fact that they tell the truth whether favorable to their side, or not—have the greatest influence upon jurors. Often a party to a cause has won strength for his side by frankly admitting on the stand facts not of value to his case, but none the less true. So, of his witnesses; if they give their testimony truthfully, they will materially aid, even if they state facts not entirely favorable. When their evidence, with respect to damages, values, amounts, etc., is conservative it will have much more influence than will exaggerated statements. Truthful witnesses have the greatest weight, and nowhere is honesty better policy than in the witness chair.

**§ 179. Witnesses' characteristics and temperaments must be studied.**—The preliminary examination of a witness not only gives a knowledge of his testimony, but secures what is also important, a knowledge of the witness himself. Witnesses, like all men, differ in their characteristics and tempera-

<sup>1</sup> 1 Elliott's General Practice, § 111.

ments. If they are met with and known before trial, the advocate is then prepared to conduct their examination with greater ease, and to secure much better results. Thus, the dull and slow witness can be asked plain questions, easily understood, and be gently led to the chief subjects; the swift or smart witness held down to the facts, and the timid helped over his embarrassment. Counsel will also be able to know whether it will be the wiser course to bring out the strength of the evidence of a witness in chief, or to let it remain for the cross-examination of his opponent. There are many witnesses, the obstinate and uncertain included, who will help out the side on which they are called much more under the fire of cross-examination, especially if it be peppery, than on the direct examination. Again, the witness himself will be more at his ease when he knows the examining counsel, and has previously rehearsed his testimony to him. In short, the advocate must meet and know the witnesses in a cause to properly conduct their examination.

**§ 180. Clients' and witnesses' general reputation and character.**—In addition to knowing the client and his witnesses, it is of value to the advocate to ascertain their general reputation and character, as well as their public standing. The jury will often be as much controlled by the character and reputation of a client or his witnesses as by their testimony. Indeed, they will sometimes give but little weight to their evidence if they are persons in bad repute. This reputation may not be confined to their character alone, but may extend to their trade or business, if not to their religion or nationality.

Hence, the advocate must both be prepared to defend the client and his witnesses in their reputations, and to secure full information concerning them before selecting the jury, in order that the case may be tried fairly and without unjust prejudice. The character of the business of a client is often of great importance. He may be engaged in a trade or occupation which may be regarded by the jury as immoral, or as against public policy, as they regard it, and thus their prejudices may warp their judgments. Again, the client may be one against whom class prejudices exist, unjust as are such feelings, and preparation therefor should be had. Hence, the lawyer, in preparing a cause for trial, and in weighing the chances of success, must bear these things in mind, and to be forearmed against the trial, must know all about his client, as well as his witnesses, and be able, so far as lies within his power, to overcome the prejudices which may exist against them.

**§ 181. Statements of witnesses usually stronger than their testimony at trial.**—It is to be remembered that the lawyer is likely to obtain stronger statements from some witnesses, and even from his client, at the office examination, than in the court-room, where, from fear, forgetfulness, or, possibly, from willfulness, they may surprise the advocate with testimony quite different from that given by them at the consultation. Witnesses in the quiet of the lawyer's office, and away from the eye of the public, and, particularly, when not under the fire of cross-examination, are sometimes likely to put an entirely different color upon their evidence than when called to testify at the trial. This so frequently happens, even on

direct examination, that the experienced advocate has become inured to such disappointments.

The witness more frequently fails on cross-examination, and, for this reason, should be subjected, at the preliminary interview, to as rigid a cross-examination as he may expect to receive at trial from the hands of opposing counsel. This not only for the purpose of preparing him for the ordeal he must then pass through, but, equally, to ascertain whether his evidence can be relied upon. In no other part of the trial can counsel be more forearmed than by being thus forewarned of the strength of the evidence. The lawyer should also bear in mind this possible discount from the office testimony, when given in court, in forming his judgment of the chances of success, and in advising his client to bring the action, or to defend one threatened against him.

**§ 182. Documentary proof.**—The preparation of the oral evidence concluded, attention should be given to the documentary proof ; such as deeds, agreements, letters, etc. These should be seen by counsel, rather than to trust to a statement of their contents from the client, whose recollection may prove at fault, and who is more likely to give his own construction of the writings than their exact language. Again, a close examination may discover proof of fabrication, alteration or forgery. For the same reason copies should not be depended upon, but, in every case, the originals should be demanded when they are in the possession of the adversary. It is also of much value to make and keep accurate copies of the more important documents for use in case of loss of the originals.

§ 183. **Construing writings.**—Construing documents requires the exercise of the best legal talent, and, for this reason, the successful lawyer must thoroughly study and understand them before trial. To properly master the documentary evidence he should know all the facts and circumstances under which they were executed and the situation of the parties at that time. These side lights, strongly applied, will often render that intelligible which otherwise is not capable of a thorough understanding. All this requires from the advocate careful examination and close thought, as well as thorough investigation, so that he may be the master of his documentary, as well as of his oral, proof.

§ 184. **Maps, plans, etc.**—Much assistance is obtained in the elucidation of a cause by the production of maps, plans, photographs, models, etc. These will well illustrate the case and materially assist the court and jury in comprehending it; hence, where this auxiliary proof is proper and helpful, it should be produced. Of course it is to be remembered that these maps, plans, etc., must be accompanied by evidence as to their correctness given by those who prepared them, and by witnesses familiar with the places or property they are intended to present to view.

§ 185. **Digesting the evidence—Ascertaining the strong points.**—The evidence secured, the next duty of the advocate is to so thoroughly study it that he will know it in detail, as well as in its general plan and outline. It is not necessary that he should memorize the testimony, but he must sufficiently master the facts to have them thoroughly digested

and understood. This done, he must apply his own judicial faculties to the case to ascertain what are its strong and what its weak facts, in order that he may discover its essential and turning points. Experience teaches that almost every cause has one or two important features, or distinctive questions, by which it will be chiefly controlled. The skillful advocate will make it his duty to discover these prominent points, and, when found, be prepared to show their strength, if within his proof, or to meet and overcome them, if presented by his opponent.

§ 186. **Arranging the evidence.**—The evidence, as it comes from the witnesses at the preliminary examination, will be crude and need working into such shape as will show its strength, and, in such a manner that it can easily be grasped by the jury. To do this the advocate needs to adopt a rigid system so that his forces may be properly arrayed for the battle. The trial should not be a disorderly skirmish, but a well planned campaign, with every regiment in its place, every soldier ready to fight his best, and the general in command in possession of a perfect plan of action. He must have in mind a theory on which he is to try his cause, and one which is so complete and well in hand that from it will radiate the whole system of the case. This theory can be likened to the spinal column of the body. To it must be fastened, in their proper order, the bones and sinews of the facts, which, clothed with the flesh of the law, and filled with the life and blood of the argument, will build up and present the perfected whole.

It is essential that the evidence at the trial should have been arranged in such an orderly manner that

it may be logically submitted to the jury, that they may be enabled to fit it together and comprehend the bearing one part has upon another. It is like the construction of a house; the plan must first be made, then understood by the builder, and then closely followed. Those who watch its erection will, at its completion, see and understand it in all its parts, as well as a whole. The evidence of a case can best be presented in the order of its occurrence, by arranging the narrative of events in the sequence in which they happened. By this plan the most complicated case can be unraveled, and the relation of one set of facts to another discovered and comprehended.

**§ 187. The probabilities of facts.**—As we shall show at length in another place, more than the mere naked facts are required; the probabilities of those facts must also be shown.<sup>1</sup> To do this the surrounding circumstances must be given in order that the facts which are presented may both seem to be true when proven, and can be shown to be probable at the argument. These inferences from the facts the lawyer must resolve out of the evidence, and so present his facts to the jury that they will see their force and effect, and be able to apply them to his client's case. Thus, and thus alone, can the advocate feel assured of winning his cause.

**§ 188. The brief of the facts.**—The notes taken at the examination are necessary for use in making up the line of conduct of the case. These should be as

<sup>1</sup> Chapter XXXVI, §§ 375, 376, 377.

extensive as possible, especially where precise language is to be proven. From the notes the trial brief of facts is made, which has for its first object a plan or order under which the evidence is to be introduced. As has been already said, this should follow the events in the order of their occurrence, so that the case may go to the jury in its natural sequence. Its second object is to give an outline of that which will be proven by each witness. This need not be *in extenso*, but should cover in a short, but still intelligent manner, a statement of the leading points of the evidence. A properly constructed brief is like a well-told story; it should have a natural appearance, and be arranged with respect to the order of time, place and circumstances of the case. Under the practice in England, where the witnesses are seen and the evidence is prepared only by the attorney, and then submitted to the barrister, who tries the case, very elaborate briefs are prepared and much more extensive than those necessary for the American lawyer; still, some of the rules laid down by Mr. Chitty for their preparation are valuable in the way of suggestions; they relate directly to the plaintiff's case, but are equally applicable to those of the defendant. We have stated them much more briefly than as given in the original text, some being entirely omitted.

**§ 189. Chitty's rules for preparing the brief of facts.<sup>1</sup>**—1. "After the draft of the statement of the facts, with observations and proofs, has been settled, then the attorney should most carefully and clearly analyze and state in three or more distinct para-

<sup>1</sup> 3 Chitty's General Practice, §§ 847-858.

graphs, concisely, first, the plaintiff's case, and very distinctly every item of the plaintiff's claim; secondly, the expected defense; and thirdly, the best answer to that defense. These three paragraphs, very legibly written, should form the commencement of the brief immediately after the statement of the pleadings.

2. "The case or full statement of the facts, with observations, should properly follow the above suggested analysis, and precede the statement of the proposed proofs. The detail of facts should be in the natural historical order, stating circumstances as they arose, whether for or against the plaintiff.

3. "In preparing the brief, it is in general advisable to incorporate all important or explanatory documents and letters, unless they be very voluminous. It will be advisable also in the margin to state the date of, and designate each by numbers or letters, as A, B, C, etc., corresponding with the same numbers or letters indorsed on the backs of each, so that they may be produced with the utmost expedition. In many cases it may be very material to have maps, plans, photographs, or even models of lands, water-courses and buildings carefully prepared, and their correctness proved by the artist.

4. "A compact analytical table of the dates of every material fact, arranged in natural order, may then in general follow with utility.

5. "After the statement of facts, it is generally useful to introduce some observations and reasonings on the plaintiff's case, and proofs on the part of the defendant.

6. "In an important cause, or where the docu-

ments or witnesses are numerous, it has ever been found useful, immediately before the detailed statement of the proofs, to insert a brief sheet containing an ‘Analysis of Proposed Proofs,’ being merely an abstract of the facts, and referring to the pages where each will be found.

7. “In point of arrangement, the best course is first to state the formal proofs which may be indispensable in certain causes, independently of the merits. After these, then the full proofs of the merits, according to the nature of the case, should be stated in natural logical order. In preparing the latter, attention should be paid to arrangement, and much judgment is frequently required.

8. “The evidence of the same witness should not be detached into the various branches of the case in which he is to testify, but should be given consecutively; a marginal note calling attention to the different points and facts to which he can testify.

9. “The age, character and temperament of each witness, as well moral as physical, should be stated, so that counsel may be forewarned for the examination.

10. “The proof to be adduced by a witness should be stated in the very words he used on the preliminary examination, when it refers to precise language, dates, amounts, etc.

11. “After concluding the evidence it will be proper to state more in detail than in the previous analysis the expected defense, and the evidence that will probably be adduced in support of it, with full observations upon its fallacy or weight, and the names and characters of the witnesses for the opponent, and

all circumstances upon which a cross-examination may be useful; but in preparing the latter, the facts only are to be stated, leaving it in general to the counsel's discretion what particular questions should be put, and which need not to be stated in the brief, though sometimes useful as another mode of stating the facts."

The beginner at the bar, who has sufficient time to prepare a brief of the facts of his cases in the form used by the skilled attorney in England, will find that he has thus acquired a mastery of the cause which could not be so well gained in any other way. The English brief is not as valuable at trial with us as it is there, but in preparing a case for trial that system has many advantages.

In addition to the trial brief, or rather supplementary to it, the advocate should have a plan of battle, that is an outline of the course he intends to pursue, and the order in which he proposes to move his forces, whereby he will be able to try his case more systematically, and be less likely to omit or overlook an important piece of evidence or a document necessary to his case.

## CHAPTER XXI.

### PREPARING THE LAW.

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§ 190. **The theory of the case.**—The evidence secured and digested, well arranged and briefed, the duty of the advocate is to prepare the theory of his case, and upon which it is to proceed. This includes the plan of action, the grounds upon which it is to

be tried, the logical sequence of its facts, and the determination of the principles of law governing the case. This theory has been well defined to be "a comprehensive and orderly mental arrangement of principles and facts, conceived and constructed for the purposes of securing a judgment or decree of the court in favor of a litigant."<sup>1</sup>

There may be cases of such inherent strength that they can be won without a theory, but almost always it is required. A study of the causes won by the successful members of the profession will develop a plan or a theory upon which they proceeded, not only guiding them to victory, but, apparently, the chief means to that end. As we have said in a preceding section, a proper theory of the facts is required in order to so arrange the evidence that one part may follow the other in proper sequence, and that all will unite in establishing the one central conclusion. So, must the law of the case be prepared and applied in accordance with this plan, in order that the facts as proven at the trial may come within and establish that theory. It must be remembered that whatever breaks does so at its weakest point, and here arises the necessity for the utmost care in working out the plan upon which the cause is to proceed. Wherever the case seems weak it must be guarded and fortified, in order that it may be defended from the attacks of the adversary. The advocate must expect his opponent to know where he can best assail him; thus, his weak points are, correspondingly, the strong ones of the other side, and with that in mind he prepares his case.

<sup>1</sup> 1 Elliott's General Practice, § 93.

**§ 191. The theory must be settled at the outset.**—This theory should be worked out before the action is commenced; certainly, while it is being prepared for trial. It must be well thought out and digested, for upon it the advocate will either succeed or fail. Once adopted it follows through all of the case, and can not, usually, be abandoned. This, because the theory will appear in the pleadings and in the issues, and to those issues the case must be confined. The lawyer must settle whether his cause is to be tried at law, or in equity; the form it will take in the pleadings and procedure; the line it will follow; and the evidence and legal principles which will be controlling at trial. Often his success will depend upon his choice of routes, and of the means for transportation he has selected for his journey; and at the conclusion of his case he may find that he has made an unwise election, and that by another route he would have arrived at the desired end. Nevertheless, the road and the conveyance must be decided upon before the journey is begun, and it is, therefore, of the utmost importance that the greatest care and forethought should be exercised in settling these preliminaries.

**§ 192. Instances of selecting improper theories.** Illustrating the selection of theories these instances are cited by Judge Elliott: “In one case, counsel brought an action on a promise and succeeded, although the statute of limitations was pleaded; while, on the same facts, the first action brought for the recovery of damages for fraudulent representations was defeated by the plea of the statute of limitations. In another case, an action was brought on a promis-

sory note. The defendant pleaded a discharge in bankruptcy; the plaintiff replied the general denial, and failed; although, if he had pleaded that the debt was a fiduciary one, he would have succeeded, as many others did in cases where the facts were precisely the same in legal effect. In still another case, a man fell into an excavation in a public street, made by parties licensed by the municipal corporation. The theory adopted by counsel was that the corporation was liable for the negligence of its licensees; but the theory was unsound and the plaintiff was defeated. The same facts were laid before other counsel; they constructed a theory that the corporation was liable because it was chargeable with notice of the dangerous condition of the street, and on this theory tried the case and secured a verdict.”<sup>1</sup>

**§ 193. Settling the principles of law governing a cause.**—The facts of a case well in hand, and the plan of action laid out and well digested, the next duty of the lawyer is to determine the principles of law governing his case. To do this properly he should first take up the cause as original matter, and endeavor to settle what the rule should be on principle, before looking up the authorities to correct or confirm his first impressions. This he should try to do impartially, with the exercise of his best judgment, and without considering the advantages, either to himself or his client, to result from success. He should look upon the case as would an outsider, such as the court or a referee, and before his opinion may be changed by consulting the authorities.

<sup>1</sup> 1 Elliott's General Practice, § 89-90.

But it is important that these first impressions should not be permitted to warp his judgment, when an examination of the decisions may tend to show that the rules of law governing the case differ from his previous conception of what they are or should be. Like the upright judge, in reviewing the cause of the unsuccessful suitor, the careful lawyer will give his judgment a new trial, if he finds it has been erroneous. It is presupposed that the lawyer has a knowledge of the rudimentary principles of the law, and of the ordinary rules of pleading, practice and evidence. Without that much knowledge his preparation of a cause would be very weak and inefficient.

**§ 194. Knowledge of the principles of the law essential to the lawyer.**—In earlier days, and before the present enormous growth in reported adjudications, the lawyer was compelled to very largely depend upon the established principles of law to guide him in the preparation and argument of his cases, and was often without any decision even approaching the case he had in hand. Hence, he was compelled to base his positions upon principle, and, in that way, to reason out his client's cause. While the growth of case law has made unnecessary much of the labor formerly required in preparation, still, it is clear that the lawyer of an earlier time was sharpened to his work by the thorough study he was compelled to give his causes, and by the necessity of referring them to, and measuring them by, the standard principles of law. None the less should the modern lawyer be well grounded in these principles, even if he is able to cite a case apparently sustaining his position. He needs this knowledge because a reported

decision is not an authority unless it can be defended on principle, and also that he may know that the citation does rule his case. The established principles of the law are basic, and he is indeed a poor lawyer who has not mastered them. With them in mind he can show the application of a decision, or point out where one which has been cited by his opponent is not an authority for the position he has taken ; while, without this fundamental knowledge, he is at the mercy of a skilled and learned antagonist.

**§ 195. Difficulties of ascertaining the subjects of the law covering a case.**—One of the difficulties of the preparation of a case is to determine the general subjects of the law to which it relates, and then which one of its many departments contains the decisions and statutes covering the various questions involved in the controversy. Here, the learning and ability of the lawyer are at once called into action ; he must know for what he is to search, and where to find it, and to do this he must know what branch of the law he is to investigate. It is this very thing which often so distresses and perplexes the lawyer that he will echo the saying: “It is not so difficult to know what the law is, as it is where to find it.” He will sometimes flounder for a long time in the mire before he feels the solid ground under his feet, and is able to take hold of something leading him into the right path. This is not always the case ; but every experienced advocate will remember certain causes, particularly those of his novitiate, where he devoted many weary hours to ascertaining into which one of the branches of the law his case fell, before he was able to pick up the thread of the law enabling him, in

time, to form the strands making up the strong rope which firmly bound and fastened his cause.

**§ 196. Helps in determining the law of a case.—** It is most difficult to give the beginner much assistance in this direction, but he will find that he is helped by his thorough mastery of the principles of the law, and that continued study and experience will so aid him that, in time, he can make his start in the preparation of the law of a case much more readily than in the earlier days of his practice.

Among the great helps to the proper preparation of causes are some of the modern digests and text-books. While many text-books are very inferior in the essential of complete indexes, there are modern writers who have well performed that important duty, and have given the profession works, not alone valuable for their subject matter, but, still more, for their practical and elaborate indexes. And so it is with some of the digests ; they have been prepared for the purpose of lessening the labors of the profession, by so increasing the subdivisions of their subjects that the lawyer is able to find a beginning for the question he may have to examine. The modern system of digests is to be commended. They accomplish the two important objects of saving time, and of so subdividing the subjects as to materially assist the lawyer in securing a start in the preparation of his case. The enormous number of reported decisions of our day requires some form of digest or index in order to make them of any practical use to the profession. The American Digest, from the West Publishing Co., and the General Digest, published by the

Lawyers' Co-operative Publishing Co., index all the decisions for each year, and either forms an excellent supplement to a good working library of well selected text-books.

**§ 197. Want of uniformity in naming legal subjects.**—The student will learn that what he needs to find is the name given to the subject of inquiry in the digests and text-books ; that found he is started on his journey. It is in this, however, that all the law writers and editors are not uniform ; unfortunately, they do not unite in using the same titles—would that they did—and often the lawyer is compelled to look under more than one head to find that which he seeks. For example, in some reports and text-books we are referred to Bills and Notes ; in others, to Notes and Bills ; in still others, to Promissory Notes, and yet again, to Negotiable Instruments ; while some, perhaps, may entitle the subject Commercial Paper. This lack of uniformity adds to the labors of the profession, and raises the hope that at some future time we may be favored by one name or title for the same thing.

**§ 198. A case illustrating the subjects of law to be examined.**—By way of illustration, and showing the questions of law involved in a cause, and the different subjects which may be required to be examined, this may be given, although it is a very simple case, and not at all difficult of preparation.

Let us suppose that our clients hold the note of a firm given for merchandise, and upon which they desire to bring suit. The defenses, we will say, are two: (1) By one of the alleged partners that he

had withdrawn from the firm, and had given notice thereof by publication in a newspaper at the place where the business was carried on. (2) By the other defendants, that the goods for which the note was given were subsequently found not to be of the quality stated in the warranty made by the agent of the vendors. These defenses the plaintiffs are prepared to contradict with evidence; they also claim that they had no personal notice of the partner's withdrawal, and, in addition, will be able to prove that the note upon which the action is to be brought is a renewal of a former note given for the goods so sold; the renewal having been granted by the plaintiffs at the request of the defendants, on the ground of the alleged bad quality of the articles, who also stated that they would waive the defect if the extension was granted. The plaintiffs also advise us that they never had dealings with the defendants' firm prior to the date on which the copartner, specially defending, alleges his withdrawal.

Now, assuming our facts to be susceptible of proof, we should be able to recover against all the defendants, excepting the ex-partner. To prepare our brief, we must look up the law under the following subjects: (1) Partnership, division, dissolution, subdivision, notice; where we will find that the plaintiffs can not hold the retiring partner, even in the absence of personal notice, for the reason that they did not have dealings with the firm prior to his withdrawal therefrom. (2) Sales of personal property, division, warranty; to ascertain how far that alleged in this case would be valid against the plaintiffs. (3) Agency; to determine the authority of the sales-

man to make a contract of warranty binding his principals ; and, the best ground we have to overcome the defense of warranty, (4) Estoppel; where we will learn that the defendants can not deny the validity of their note, or set up failure of consideration, for the reason that they not only kept the goods, but also agreed to pay for them, knowing their inferior quality, upon the promise of the plaintiffs to renew their note ; such renewal being the one now to be sued out.

**§ 199. Statute law.**—The principles applicable to the case settled, and the branches of the law under which it falls determined, attention should first of all be directed to the statute law before consulting the text-books or reports. Very frequently a case is ruled by a statute, and, as that takes precedence over and controls the common law, it must first be examined and determined.<sup>1</sup> The enactment found applicable to the case, it is first necessary to test the statute to ascertain if it is constitutional, and then to interpret it. This is a work of no mean order, and is often very difficult and perplexing, as words are frequently uncertain, and their precise meaning not easy to determine. The more complex and intricate the language of a statute the more readily can it be attacked ; when it is in plain and simple words it is more sure of standing the test.

It is more than the mere letter of the act which must be examined ; for, in construing it, we are to take into consideration the purpose for which it was enacted, the evil it was intended to remedy, the con-

<sup>1</sup> See the instance cited of a statutory change of a common law rule, *ante* Chapter II, § 22.

dition of the law at that time, and the common law upon the subject. The statute must not be considered as an independent rule of law, but as part of great system. It should also be remembered that statutes upon the same subjects are to be construed as being in *pari materia*, and so all must be weighed together.

A statute found, it is essential that all the authorities construing it should be examined, in order to ascertain the meaning and force which have been judicially given it. It may be that it is a re-enactment, or a modification, of an earlier statute; in that case the decisions upon that earlier enactment may throw a strong light upon the later one, and materially assist in its construction and interpretation.

§ 200. **Text-books.**—The labors of the lawyer are materially lightened by thorough and well-written text-books. There is a choice in books, some being of but comparative value; those being the best which discuss principles, rather than those which merely gather cases together without giving them thorough consideration. A good text-book well planned and written, and containing a thorough and accurate index, is of the greatest assistance. When it discusses the underlying principles, and collates the cases, applying those principles to their reported facts, it is a most valuable help; but if it is merely a collection of cases, it is nothing more than a digest with an index, and can not rank with a philosophical treatise. Often a text-book is full of errors, notably in citing cases, which, on examination, do not bear out the rules laid down by the writer. That proof must be

applied to the book, and when it is found that the text will bear the test the writer's statement can be taken to be the law.

When the author denies the authority of a decision, and would mark out a different rule, great care should be exercised in following his views ; the law is not what the writer says it is, but what the courts have declared it to be. When the courts have differed in their rulings, and the writer carefully weighs the cases, and refers them to established principles, his judgment is of value ; but when he lays down a rule at variance with the current of authority he can not safely be followed.

There are many text-books of standard authority, and which have frequently been cited and relied upon by the courts. Take for example, Mr. Benjamin's invaluable treatise on the law of sales ; a work which gave him a high position at the English bar, and is a recognized authority in all courts. That is, indeed, a philosophical treatise, for it ably discusses the principles of the law which he treats, and collects in a masterly manner the reported decisions. Such a text-book is of inestimable value to the profession, and can safely be relied upon.

A valuable method to adopt in the use of a text-book is to turn to the table of cases and there find a leading case upon the question under examination ; that will enable the student to find in the book itself the subject he is looking for, and will assist him in discovering other authorities bearing upon that question. The comments of the writer upon that case will enable the lawyer to follow the line of thought

he is working upon, and will assist in putting him abreast of the law applicable to his cause.

§ 201. **Law periodicals.**—In line with text-books are leading articles in the law periodicals. Some of these are of decided value, for the reason that their authors have concentrated their labors on a subdivision of one branch of the law, and will have treated that subject with greater care, and more labor, than will be found in any text-book covering a more general division. These articles are widely scattered, and difficult of access, except in the larger and public law libraries. An index to these articles, lately published, will prove of assistance in finding these monographs of the law, and, where the lawyer can have the use of a large library, he will find it to his advantage to examine this index for the purpose of finding the periodical which contains any article treating the subject he has under consideration.<sup>1</sup>

§ 202. **Case law.**—An examination of the text-books and periodicals completed, the digests of the reports of the courts of last resort of the state should be searched under the same headings, and the reported decisions applicable to the case in hand carefully studied and briefed. These are to be followed by the cases in the reports of the inferior courts of the state, for it is to be remembered that those adjudications often have more weight than the decisions of the courts of last resort of other states, as the judges delivering them will be known at home, and their opinions regarded more favorably than those of other courts. Following these should come the re-

<sup>1</sup>“An Index to Legal Periodical Literature.” Boston: C. C. Soule. 1888.

ports of the Supreme Court of the United States and of other federal courts; the English reports, and those of other states; the inquiry being carried down to the latest adjudications.

**§ 203. Selection and discrimination of cases.—** The lawyer is likely to secure too many, rather than too few decisions. Here, again, lies one of the difficulties in preparing a brief, for it is to be borne in mind that one case, well considered, clearly ruling the question, and by a court well regarded, is of more value than a dozen not so well considered, or as clearly defining the rule. It is well to study all the cases applicable to the question, and, perhaps, to note them in the brief in a secondary way, but the advocate should place his reliance upon, and first cite in his brief his strongest and best authorities.

While the great increase in modern days of reported cases enables the lawyer to secure decisions ruling many of the causes he is to try, or approximating to them, it has increased his labors in that he must the more exercise his power of discrimination.<sup>1</sup> As no circumstances are always exactly alike, so, seldom, if ever, can he find a case where the facts are precisely the same as those of his own cause. This dissimilarity in the facts and circumstances of cases compels the lawyer to call to his aid the power of differentiation, the art of distinguishing one case from another. Thus, if the decision is one cited by himself, he must be able to show by logical reasoning that the differences in the facts do not alter the rule,

<sup>1</sup> A late writer estimates the number of law reports in the English language at 69,000, and the cases they contain at more than 2,000,000.

and, if a case is to be used against him, he should be equally prepared to mark the variance in the facts, and to bring his own cause within the exceptions which he points out. He will often find that a reported case, which, at first reading, seems to rule his own, will develop such differences in fact as to take it out of the way as an authority in his cause. A general rule may have been laid down by the courts, but his own case may prove to be such an exception as not to be within the application of that rule. This is for the lawyer a mental problem, requiring an exhaustive study of the decisions and their careful comparison with his own case. He must be the master of the established principles of the law, for thus alone will he be able to bring his causes within those principles, and to firmly fasten it upon what has been held to be the law. Lord Abinger well said : "I may observe, what a long course of experience has taught me, that the lawyers least to be depended upon are those who are in constant pursuit of cases in point to govern their judgment, and who, therefore, seldom have sufficient knowledge of principles to judge for themselves."

**§ 204. When a decision is not an authority in a case.**  
—It is to be remembered that a judicial decision is, in a strict sense, an authority only in the jurisdiction where it is delivered. While all decisions are called authorities, in a general way, they are but arguments outside the jurisdiction where they are pronounced ; they may be arguments of such force as to be taken as authority, but it is seldom that they will be ac-

<sup>1</sup> Memoirs of Lord Abinger, 45.

cepted in reversal of a settled rule in the forum where they are cited. The doctrine of *stare decisis* is of great force, and rarely will the courts forsake their former positions to adopt the contrary opinions of the courts of other states. Hence, the lawyer must not expect to win where the current of authority in his own state is against him, even though he may find numerous decisions of other tribunals strongly in his favor. His courts may let him out by discovering an exception to their own rule, and may, in time, by making so many exceptions, "eat out the heart" of their own rule, but a flat reversal of one of their former decisions is a *rara avis* in the courts of last resort.

§ 205. **Criticism of cases.**—It is an accomplishment to know how to properly criticise a case; and this is of use both in the preparation and in the trial of a cause; as in the former, a decision may be found, and in the court room, one may be cited, properly open to objections. Skillful criticism of cases evidences a good lawyer, and is one of his best weapons. The first thing to do is to determine the precise point which has been adjudicated. The law of a case is that only which has been pronounced as a ruling upon the issues thereby raised. To determine those issues the facts of the case must be carefully studied, and whatever may have been said by the court in its opinion, outside that which rules the issue, is but *dicta*; it may have influence as an able argument, but it does not have the force of an adjudication. Lord Manners said : "It is always unsatisfactory to abstract the reasoning of the court from the facts to which that reasoning is meant to

apply. It has a tendency to misrepresent one judge and mislead another."<sup>1</sup>

For the reason that it does not fully state the facts, the reporter's syllabus of a case can not be fully relied upon. Again, it is often in error in stating just what has been decided, some reports containing most glaring mistakes in this direction. A syllabus is of value as an index to a case, but should not be depended upon as correctly stating the law there adjudicated.

Further criticism of a case is of the nature of the report, many being of well known inferiority, and lacking in accuracy and careful preparation; of the language of the opinion, showing illogical reasoning, or want of citations in support of the adjudications, or unconscious overruling of other authorities; that it has been delivered by a divided court, the dissenting opinion being much the stronger in logic and reasoning; that it goes off on another point than the one for which it is cited; that the case is one decided by an inferior court; and, lastly, that the decision has subsequently been overruled, limited, criticised, or distinguished in later cases, or is now obsolete, or has not been followed in other courts. Any one of these attacks upon the case, if skillfully made, and based upon a thorough study and knowledge of it, may remove the decision from a position of authority.<sup>2</sup>

**§ 206. The other side of the case should also be prepared.**—It is not alone necessary that his side of

<sup>1</sup> *Revell v. Hussey*, 2 Ball & Batty 286.

<sup>2</sup> Wambaugh's Study of Cases is a valuable work on the subject of the proper criticism of decisions.

the case should be well prepared ; the lawyer should also make himself familiar with that of his opponent, by thoroughly examining the cases upon which he may expect him to rely. It is a mistake to underestimate the ability and labors of the counsel engaged on the other side, for the lawyer should ever bear in mind that his antagonist is probably familiar with the law and facts of the case, and will take care of his side to the best possible advantage.

To be entirely ready properly to try his cause, the advocate should prepare the law applicable to the case of his opponent with as great care, and as much diligence, as he applies to his own positions. He should take up the case of his adversary on the theory which the pleadings seem to indicate will be the line of defense, and, if that scheme is not apparent, he should put himself in the place of his antagonist, and construct a theory with as great care and thought as if it were his own. If he is in possession of the plan of the enemy, is familiar with the authorities supporting it, and has mastered the other side of the case, he is ready for the trial, and when it comes off is the better enabled to defend his own positions, as well as to attack those of his opponent. The able general is the one who knows both the strength of his forces and the weakness of his own positions, and is also the master of the strong and weak points of the adversary. Thus, and thus alone, is he prepared to gain the victory when the battle is on.

**§ 207. The brief of the law.**—The preparation of the case finished, there should follow a thorough brief of the law, in the orderly arrangement of the

several subjects ; referring to the various principles, and citing the authorities upon which the case is to be rested ; seeing to it that those decisions bear out the positions assumed, for a statement of law, not supported by the authorities cited, can not fail to be injurious to the cause. As we have before said, the strongest and best cases should first be cited, giving the others a secondary place in the brief.

It is to be remembered that almost every case has one prominent question upon which it will turn, whether it be of law or of fact ; therefore, the strength or weakness of the party upon that point leads him either to victory or defeat. Hence, the brief should be chiefly devoted to that question, and to its careful preparation the labors of the advocate should principally be given.

**§ 208. A thorough brief needed where questions are reserved.**—It can well be said that while the oral argument is as silver, the brief is golden. The advocate should leave a good impression on the minds of the court at the hearing, but he must depend upon his brief for a favorable decision. This is of the utmost importance in cases where the questions of law are not to be decided at bar, but are reserved for future investigation and determination. Such are arguments in the appellate courts, where so many cases are heard that counsel can only hope to state his positions so clearly that they will seem to the justices to be of sufficient importance to entitle him to a favorable memorandum in their notes, the full strength of his case being discovered from his submitted brief.

A brief can be too verbose, and, therefore, may not

receive full attention ; but, if it is succinctly drawn, and the positions are clearly and concisely stated, with the authorities well arranged and accurately quoted, the advocate can feel sure that he has an argument speaking for him in his absence, and while the court is making up its decision and opinion.

**§ 209. Preserving briefs for future use.**—It is of practical value to preserve copies of all briefs, as they will be found of great assistance, not only in future arguments of the same case, but, as well, in the preparation and argument of other cases involving similar questions. Some system should be adopted, both to preserve the briefs and to readily find them ; such as by properly indexing their various subjects. It is worth suggesting that all printed briefs should be bound in volumes of convenient size, and, also, that they should be well indexed. The accumulation of such books in a lawyer's library will prove of value as his practice increases, and materially assist him in his future work. In the same line, it is often valuable to secure the briefs of counsel in reported decisions, if they can be had ; this because the reporter's notes of the argument are usually very meager, and often much is omitted which is of great value in mastering the questions involved in the case.

## CHAPTER XXII.

### SELECTING THE REMEDY ; JURISDICTION ; AND CHOOS- ING THE FORUM.

- § 210. Selecting the remedy.
- 211. Jurisdiction.
- 212. Local and transitory actions.
- 213. When and how questions of jurisdiction can be raised.
- 214. Choosing the forum.
- 215. Court or jury?
- 216. Change of venue.
- 217. Choosing the forum ; state or federal courts ?
- 218. Choosing the forum ; arbitration.
- 219. Practice in submitting causes to arbitration.

§ 210. **Selecting the remedy.**—While the adoption of a code of civil procedure in many of the states has there reduced the number, and thus narrowed the choice, still, even there in some degree, although more so in the jurisdictions where the common law practice prevails, there remains an election of remedies which a plaintiff may adopt ; a selection which is a matter of no little moment, and often involving much difficulty. The remedy chosen, the pleadings and the theory of the case must be made to conform to it, and, hence, all this should be carefully considered in making the choice, as a mistake in this direction may result in defeat, or in seriously endangering success.

The selection is not merely confined to determining  
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the proper remedy, but extends, as well, to deciding what is the best one. Thus, there may be an action for a tort, or one upon a contract; in the latter, the proof may be more readily secured, while in the former there might be a larger recovery. For example, it may be easier to secure a verdict in an action for fraudulent representations than it would be in an action on the implied contract; because a complaint charging fraud may open the door to evidence which would not be admissible in the other action; while, also, the jury may be more strongly influenced against the defendant by evidence of fraud than they would be by proof of the implied contract. On the other hand, it may be more difficult to gain a verdict by attributing moral wrong than by the simple charge of non-performance of a contract.

Again, the nature of the relief may determine the choice of the remedy. For instance, personal property may have been sold upon condition, and possession obtained by the defendant without performance of the condition precedent; here, the choice would be between an action *in rem*, such as replevin to secure possession of the property, or an action *in personam* to recover its value. In such cases the solvency or insolvency of the purchaser might control the choice, and upon those considerations the selection of the remedy would probably be made. It is not within the scope of this work to further refer to the choice of remedies, the suggestion being merely given of the necessity for care and caution in making the election.

The general rule to be remembered in selecting the remedy is this: "When a party has a choice of

inconsistent remedies the selection of one, with full knowledge of the facts and of his rights, is a bar to the other. But the rule is otherwise when the remedies are concurrent, and not inconsistent. In such a case the pursuit of one is not, necessarily, a bar to the other. Nor will the mere fact that a plaintiff mistakes his remedy, believing he has two or more remedies, when he has not, and pursues the wrong one, of itself prevent him from subsequently obtaining redress by the proper remedy.”<sup>1</sup>

**§ 211. Jurisdiction.**—One of the basic questions at the inception of an action is that of jurisdiction, for it must be brought in a court of competent jurisdiction with authority over that case or class of cases. The lawyer must be able to promptly decide as to the court in which his action is to be commenced; and, if two courts have jurisdiction, then which one is preferable for that case. In this matter the client depends upon his counsel, and will hold him responsible for the exercise of his choice. It is beyond the purpose of this work to discuss the many questions involved in the subject of the jurisdiction of the courts, it being our intention, rather, to offer a few suggestions on that subject, which may be of some benefit to the young lawyer.

The statute law of his state will determine the extent of the jurisdiction of its courts, and to that law he is directed in securing a knowledge of the subject. This will include full information as to how far, and to what amount, the courts, not of record, have authority to act; as also the rules governing the trial

<sup>1</sup>1 Elliott's General Practice, § 276, and cases cited.

of causes in courts of law or equity. The common law differences between those courts, and upon that distinction the statutes are based, is that the former generally afford redress for injuries to legal rights, and give effect to legal defenses, while the latter are, usually, confined to a consideration of actions for redress of injuries to equitable rights not recognized at law, and to equitable defenses not available in suits at law. Where there is concurrent jurisdiction, one court will not interfere with the other if the latter has already taken the case.

**§ 212. Local and transitory actions.**—The differences between local and transitory actions is also to be considered in connection with the subject of jurisdiction. The general rule is that actions affecting the title to or the possession of land, or of injuries thereto, are cognizable alone in the county where the land lies ; while cases are transitory when the transactions out of which they arise are those which might have taken place anywhere, and, hence, such actions can be instituted in any court having jurisdiction by law over the persons to be sued, or over personal property which forms the subject of an action *in rem* when it is found in that jurisdiction. Hence, actions to enforce contracts, to recover damages to persons or chattels, and almost all actions concerning personal property, are transitory ; while those concerning real property are, generally, local ; all this being regulated by the statutes and practice of the different states.

**§ 213. When and how questions of jurisdiction can be raised.**—Judicial proceedings may be classed as void, voidable and regular ; the important dis-

tinction between the two former being that a void judgment may be successfully attacked collaterally, and can not be regarded as having any legal existence in any court for any purpose ; while a voidable judgment can only be annulled or vacated in a direct proceeding, and until so vacated or reversed is effective.

Objections to jurisdiction can be made at any stage of the proceedings, and consent can not give jurisdiction ; excepting that waiver is generally operative when there is jurisdiction of the general class of cases, although not of the particular subject. For example, if the action be of the local class, and confined to the county where the land lies, the parties could consent to the action being instituted in another county, because the court there would have jurisdiction of that class of cases, although not of that particular action, without that consent ; or, if one is sued in a court in which he is privileged from service, he could give jurisdiction over the action by consent, or by waiver of his privilege.

**§ 214. Choosing the forum.**—While the advocate can not always select the court in which he may try his case, he may often so frame his action as to determine whether it will be heard by a court alone, or by the court and jury. Thus, generally, a suit in equity is heard by the court alone, while an action at law is usually tried by the court and jury; the latter being the judges of the facts. Where the lawyer has a choice of these forums, and he believes his client's interests will be better served by the court without a jury, he will so frame his pleadings as to bring the case within the equity jurisdiction. Thus,

he may bring his bill in equity to enforce specific performance of a contract, rather than an action at law to recover damages for its breach. Again, in a suit at law he may be able to obtain the consent of his opponent to a submission of the cause to the court without a jury, or to a referee. In this he will be largely governed by the facts and surrounding circumstances of his cause, and by the situation of the parties.

**§ 215. Court or jury?**—In choosing the forum, and in deciding whether it is best to try the case before a jury, some important consideration should have much weight. If the cause is one not so strong in its facts, but appeals to the sympathies of men, then he should insist upon a jury, as they are much more likely to be led by such considerations than would be a judge; they are not so much bound by the stern sense of duty that will control the court alone, and will search for an excuse to let a party out of an apparently unfair position which the judge is not so likely to apply. Again, when damages are wanted they are likely to be much more liberally awarded by the jury than by the court. The latter rarely give indemnity in excess of that which is compensatory, while juries are apt to add punitive damages. Thus, the weak will fare better with the jury than will the strong. A woman will have a larger verdict at their hands than would a powerful corporation.

The judgment of jurors on the facts is often better than that of the judges, for they come to the trial of a cause with fresh and unoccupied minds, and hear it with eager interest. Sir William Erle well said: “As for responsibility, a judge, being a permanent

officer, especially a judge sitting alone, is more responsible to public opinion than any individual jurymen, who is one of a body assembled only once and immediately dissolved. But I believe that the feeling of moral responsibility is much stronger in the case of the jurymen, to whom the situation is new, whose attention is excited, who for the first time in his life is called upon to exercise public functions in the face of all his neighbors, than in that of a judge who is, perhaps, doing to-day what he has been doing every day for ten years before."

The delays and want of impartiality of some judges are also to be considered ; the verdict of the jury is usually a prompt one, while the judgment of the court may be tardily rendered. There are also instances, rare it is hoped, of trial judges who are so influenced by particular advocates, or parties, as not only to fail in rendering just judgments in referred cases, but also, for the purpose of preventing reversals, in granting fair, full and accurate bills of exceptions. All these things must be considered in coming to a conclusion on this important question.

On the other hand, where the case is a strong one, although somewhat obscured in its facts, the cause is best heard by the judge alone, unless some countervailing circumstance makes a different course expedient. A judge will brush aside obscurities that would perplex jurors, and will trim down all immaterial matter and go at once to the strong points. It is almost unnecessary to add that where counsel believes that prejudice will exist against his client in the minds of the jury he will desire his cause to be heard by the judge without their assistance.

§ 216. **Change of venue.**—In connection with the question of choosing the forum, it is to be remembered that nearly all of the states have statutes providing for a change of venue to another county in the same state, the foundation of this relief being that the party applying for it must show that he can not secure justice in the court where the action is pending, either from want of impartiality of the court itself, or from public prejudice against him or his cause.<sup>1</sup> It is sometimes the only salvation of a just cause to secure its trial in a court removed from all prejudice and partiality.

§ 217. **Choosing the forum; state or federal courts?**—The concurrent jurisdiction of the courts of the United States and of the several states is to be borne in mind by the lawyer. When the controversy is between citizens of different states, and the amount in controversy exceeds two thousand dollars, exclusive of costs and interest, or it is between an alien and a citizen, the federal court has jurisdiction, and, if the advocate represent the plaintiff, he must consider the advantages of trying his cause in that court, rather than in that of the state. So, also, if he is employed by a defendant who has been sued in a state court, and the amount in controversy exceeds the limit named, he must decide as to the advisability of removing the cause to the federal court.

Among the advantages to be considered are that the judges of the United States courts are appointed for life, instead of being elected, as is the case in nearly

<sup>1</sup> Post, Chapter XXIV, § 254.

all of the states, and thus he may secure a trial before a court removed from partisan prejudices, or likely to be influenced by popular or political reasons. The federal juries, too, may be more impartial between the parties, from the fact that they are summoned from all parts of the district in which the cause proceeds, rather than from a single county of the state.

The pleadings, practice and forms of procedure in the circuit courts of the United States, by act of congress, are made to conform to those prevailing in the state in which such court is held, and, hence, the lawyer will not be embarrassed by a new and unknown procedure or practice.<sup>1</sup> It is to be remembered, however, that equitable defenses are not admissible in an action at law in a federal court, as they are in some of the state courts, and that reason may influence the choice in some cases.

Other grounds for the jurisdiction of the federal courts, such as patent and admiralty causes, those arising under the national constitution, or under treaties or statutes of the United States, and the review of the decisions of state courts on constitutional grounds, are not within the province of this discussion, beyond this general reference to the jurisdiction.

**§ 218. Choosing the forum—Arbitration.**—In addition to the modes of trial before a court and jury, or by reference to the court without a jury, or to a referee, another means for settling a dispute is by a submission of the controversy to arbitration. Omit-

<sup>1</sup> *Ante*, Chapter II, § 26.

ting the cases where there may be a compulsory arbitration, or its mode is regulated by statute, we confine our attention to a voluntary arbitration, secured by an agreement of the parties to a dispute.

An agreement by which the parties to a controversy refer it to a designated person or persons is, usually, called a submission ; the person to whom it is referred, an arbitrator ; and the decision, an award. It is the general opinion and experience of the bar that an arbitration is usually an unsatisfactory mode of settling legal controversies, and, hence, most disputes are determined by a court and jury through the ordinary process of an action at law. Still, there are cases where an arbitration is both expedient and satisfactory. Thus, controversies involving long and complicated accounts, or where, to obtain a clear understanding, it would be necessary to refer to numerous documents, or make or explain long calculations, a more just and accurate conclusion might be arrived at by an arbitration than would be by a jury of twelve men. For such cases one arbitrator would be preferable to two or three, and that one should be a competent and skilled accountant. Again, when the case is a technical one, involving the knowledge and testimony of expert witnesses, views of the property in dispute, or tests of machinery, etc., in order that the facts may be comprehended, or when a controversy arises over the details and customs of some particular trade or business, a decision more consonant with justice, and probably much more satisfactory to the parties, may be secured by an arbitration than by a jury.

So, subjects of delicacy which ought not to be exposed to public investigation, like controversies between near relatives, or intimate friends, who desire to avoid giving publicity to their disputes, should be referred to a private arbitration. There are causes, too, where the witnesses, like women, might be timid and dread the open court room, and whose evidence could be best secured, and more correctly given, in the comparative privacy of an arbitration. On the other hand, it is inexpedient to agree to a submission when it is necessary that the rules of evidence should be strictly followed and applied, or questions of law are involved requiring a judicial determination. All these considerations should have weight, and are to be taken into account in determining the advisability of removing a cause out of the usual course.

**§ 219. Practice in submitting causes to arbitration.**—Any person of legal capacity to contract may, as a general rule, submit to arbitration, and, generally, every claim in dispute, when it is not illegal, may be submitted. When an arbitration is agreed upon the term of submission should be distinctly stated in a written agreement, which should include the exact question to be submitted ; the names of the arbitrators, or the manner in which they are to be chosen ; the mode in which witnesses may be examined, and the evidence presented ; who may be present at the arbitration, and when and where it is to be held ; the manner of disposition of the costs and expenses of the arbitration, and how and when the award shall be paid, including a settlement of the fact whether or not judgment may be entered on

the award, as if by confession. Provision should also be made for the contingency of the death or refusal to act of an arbitrator, and the method by which the case may be compelled to proceed, if either party should refuse or neglect to attend the arbitration.<sup>1</sup>

<sup>1</sup> An excellent form of an agreement for submission is given in 2 Chitty's General Practice, 88.

## CHAPTER XXIII.

### PRECAUTIONARY MEASURES AND PRELIMINARY STEPS.

- § 220. Precautionary measures are needed to prevent litigation, or to assure its success.
- 221. Notice.
- 222. Various preventive and precautionary notices.
- 223. Demand.
- 224. Instances where a demand is necessary or advisable.
- 225. Tender or offer to perform.
- 226. Special contracts requiring the performance of conditions precedent to actions at law.
- 227. Admissions of fact.
- 228. Notice before action.
- 229. Mr. Harris' suggestions for notice of an intended action.
- 230. Preliminary steps—Mr. Chitty's questions.

§ 220. **Precautionary measures are needed to prevent litigation, or to assure its success.**—Somewhat of that which is contained in this chapter has but little connection with the preparation of causes, or with procedure, but has to do with those precautionary measures which are needed by a client to save him from litigation, or to assist him if he is compelled to go to law to maintain his rights, or to successfully defend if he is summoned as a defendant in another's action. So far, then, as the matters here discussed are within the nature of preventive measures, they fall within the subject of the advice which the lawyer gives his client in his office; but

as this chapter treats of the precautionary steps leading up to the successful prosecution or defense of an action of law, and which are closely allied with the duties of the advocate, they are all here properly included.

Many a lawsuit could be avoided, and many successfully concluded, if clients would learn to seek the advice of their lawyers in their affairs, and, when obtained, to closely follow and be guided by their instructions. It is because such counsel is not sought, or, when secured, is not acted upon, that men are drawn into litigation which otherwise could be avoided. There are, also, certain preliminary steps to be taken before an action at law can be commenced or brought to trial with an assurance of success, and some consideration of such needed preliminaries are given attention in this chapter.

**§ 221. Notice.**—Among the preventive measures by which a party may be saved from loss or injury, is that of giving certain kinds of notice, either publicly or privately. Equally valuable to secure present or future rights is such notice, for without it the client may fail in the litigation which he may later bring or defend. In this he needs the advice of his lawyer, both as to the necessity for the notice itself, as well as to the manner in which it should be prepared and given.

Notice should always be in writing, and served upon the party to whom it is directed in such manner that proof of the service can be had when required. It should contain such a true recital of facts, and with such accuracy that, when it is produced in the course of subsequent litigation, it may

prove to be favorable, rather than injurious, to the one in whose behalf it is given. If a statute prescribes the form of a notice, or the manner in which, or the time when it is to be given, the requirements of the statute should be strictly followed.

**§ 222. Various preventive and precautionary notices.**—While it is quite impossible to here name all the matters in which it is to be given, much less to give them any discussion, the suggestion of some of the instances in which notice is needed to prevent litigation, or to aid the client if required to go to law, will be of advantage as illustrating the general necessity therefor.

Public notices are required in these matters : of the dissolution of a copartnership, in order to save the future liability of a retiring partner ; forbidding the public to trust a wife, child, servant or former agent; of the loss of a negotiable note or bill by the holder ; by the maker of a negotiable instrument of failure of consideration, or of fraud in its issue ; warning off trespassers from private property, or from fish or game preserves ; of the ownership of personal property in the possession of others, particularly when left with the vendor ; and by executors and administrators of the grant of letters upon the estates of decedents, and requiring creditors to present their claims.

Notices of a more private form, and which are not necessarily required to be published, include those by a purchaser of personal property to one having its possession or custody, not being the vendor ; to the debtor, of an assignment of a debt or chose in action; by a trustee to tenants of real estate, to protect the

interests of his *cestuis que trust*; by a landlord to his tenant to quit; of the readiness of a party to an agreement to perform a condition precedent therein contained; of a loss by fire covered by a policy of insurance, or of death in the case of a life policy, in both cases to be followed by formal proofs executed in the manner required by the terms of the policy; of non-payment of bills or notes to hold an indorser; to remove or cease a nuisance; to a covenantor of title, or of indemnity, of an adverse claim, or of proceedings by third parties; by a stakeholder, of a demand or action by one of the claimants; by a creditor to a surety, of goods or credits furnished the debtor; to a guarantor, of the default of the principal; by a material man, or workman, of articles of labor furnished a building, if required by statute to enable them to subsequently file a mechanic's lien; to a municipal corporation, of a defect in a public street; or by a municipality to one who has obstructed a street, of an action brought to recover injuries sustained by such obstruction.

§ 223. **Demand.**—Before an action can be commenced, with any assurance of its successful determination, the cause of action must be complete. While the main facts of a case must be secured, there are certain minor elements equally necessary to success, and, in providing for them, the assistance of the lawyer, as well as his advice, may be needed. Among these preliminary requirements, in addition to that of notice, which we have described in the two preceding sections, is that of a proper demand. This should be made so as to clearly indicate what is demanded; it is to be made at the proper period, at a

suitable time and place; should permit of a reasonable time for performance, unless that period has been fixed by the contract of the parties, or has been determined by law; and must be made upon the party whose duty it is to perform the act or to do the thing required, or upon his duly authorized agent, attorney or representative. It is best that a demand should be made in writing, and proof of its service should always be forthcoming, as well as of the precise form of the demand, which can be had by preserving a copy of the writing.

**§ 224. Instances where a demand is necessary or advisable.**—Among the various cases where a demand is of value, if not absolutely essential, the following may be noted. For payment of a bill or note payable on demand; of an account or debt, when necessary to mature it, or to secure interest from that time; on a general promise to marry; for an accounting from a partner, agent or trustee; upon a bailee, or a person who may have lawfully acquired the possession of personal property, in order to establish a conversion; upon a tenant by sufferance, for the possession of real estate; upon an infant, or person under disabilities, for the return of personal property, where an action would not otherwise lie to recover its value, and its retention after such notice would subject such person to an action for the recovery of the property, or of its value; for a retraction of an alleged libel, or slander; for goods, when, by the contract, they are payable *in specie*, so as to recover their value in case of refusal to deliver; in some cases, to support an action *ex delicto*; and for a deed, where the suit is to compel specific perform-

ance of a contract for the conveyance of real estate. In many cases the suit itself is a demand, and all that is required ; but, on the other hand, there are cases where a demand beyond that contained in the action is absolutely essential to a recovery.

**§ 225. Tender or offer to perform.**—The merits of a case, particularly for the defendant, are often materially assisted by a tender. The most common form is by a debtor to his creditor, where it must be made by the debtor himself, or by his agent, and to the creditor, or to one authorized to receive it. If the tender is made in goods it must be of the identical articles required by the contract, or, of the same kind. If in money, it must be in gold or silver, or in money made legal tender by law.

The tender should be unconditional ; a demand for a receipt in full, or for the surrender of a particular document, as a condition precedent to the tender, usually rendering it void. It must be made at a proper time and place, and the money or article tendered should be produced, if feasible, or offered symbolically if of property not reasonably movable. When a tender is made after a suit is brought, it must include the costs of the action to that time, and should be paid into court, and tenders must always be kept good and ready to be produced when properly demanded. Full proof of a tender must always be accessible ; to that end a memorandum of the time, place and words of the tender should be preserved, subscribed by the witnesses to the act.

In addition to the tender by a debtor to his creditor, these instances can be noted: to secure a rescission of a contract, by putting the other

party in the same position he was before it was made; in an action for specific performance, to secure the benefit of the agreement, by a purchaser to the seller of real estate of the consideration with a demand for a conveyance; in an action for breach of contract, as, for example, when one is hired for a determinate period, and is discharged before the end of the employment, an offer to serve during that term is essential; and, always, when the contract itself requires a tender, as well as in all cases when an offer to perform is necessary to establish the rights of the party to successfully prosecute or defend an action.

**§ 226. Special contracts requiring the performance of conditions precedent to actions at law.**—In addition to the cases where an offer to perform is necessary to complete the cause of action, there are special contracts which may require the performance of certain conditions precedent before an action at law can be instituted, or which may contain stipulations for the adjustment and settlement of disputes without resort to the law. Of the former class a familiar instance is that of a fire insurance policy, requiring that the amount of the loss shall first be determined by arbitrators chosen by the parties, or by an umpire selected by those arbitrators, in case they can not agree. Or where in a building or construction contract a certificate of an architect or engineer is required, in the first instance.

Of the second class are cases where the contract may provide that all disputes shall be settled by arbitrators therein named, or to be chosen by the parties, and expressly providing that an action at law

can not be had between the parties concerning any disagreements arising out of the contract. While there is a decided conflict in the decisions of the courts touching the question whether parties, in advance of any dispute, can completely oust the jurisdiction of the courts, by requiring them to abide by the adjudication of another forum, and without discussing that much mooted question, this general reference is made to the subject to remind the reader that there may be certain preliminaries, of the nature to which we have referred, which must be disposed of before an action can be instituted, or perhaps, in lieu of that action.<sup>1</sup>

**§ 227. Admissions of fact.**—It is often of value to obtain admissions of fact from an adverse party, and as often equally dangerous to make such admissions; but there are facts in a cause which can not be disputed, and to prove them would require unnecessary cost and expense, and, hence, it is frequently advisable to make proper concessions, because if required to be proven, and the case should result adversely, costs might be incurred which otherwise could have been avoided ; nevertheless, unless the facts are clearly true, and can undoubtedly be proven, it is dangerous to admit them, and great caution should be used in making any concessions. When made the facts should be admitted only for the purpose of the cause in which they are conceded, and the stipulation should invariably be in writing.

<sup>1</sup> 1 Elliott's General Practice, 408, note 1, collates the cases showing the conflict of the authorities on the question of the power of the parties to a contract to oust the jurisdiction of the courts, in advance of any controversy.

§ 228. **Notice before action.**—The courteous attorney will not, generally, institute an action without giving the other side some notice of the intended suit. This does not refer to cases where the plaintiff's rights might be injured by such a notice, or where the exigencies of the cause demand an immediate commencement of the action; but, as a rule, where the lawyer is employed to conduct a litigation against his client's debtor, or against one who has injured him in person or property, some notice of the proposed action should first be given. Most men feel aggrieved if sued without previous demand or notice from opposing counsel, and, hence, the courtesy which would suggest that notice ought not to be wanting.

The demand should be couched in the language of politeness, nevertheless it should contain full notice that an action of law will be instituted if the matter is not adjusted within a time named. Care must be taken that the full amount of the plaintiff's claim is demanded, and that his rights are not thereby injured or lessened; while, on the other hand, a demand for very much more than there is any possibility of recovering might work positive harm to the client.

§ 229. **Mr. Harris' suggestions for notice of an intended action.**—The remarks of Mr. Harris on this subject contain excellent suggestions. "He who goes to law goes on an unknown journey, and may come back worse than he started, a repentant and unpitied prodigal. There is one class of persons, however, who may issue this challenge with impunity, and that is those who have nothing to lose.

A penniless suitor and an unscrupulous lawyer may scour the country with the Queen's writ in their hand, and levy blackmail to a surprising extent, if only they have skill enough to seem honest. They may destroy a character or break up a home by authority of this slip of parchment. \* \* \* The Queen's writ, as an instrument of revenge or cupidity, belongs only to civilization. It is one of the penalties of social life, as well as one of its most admirable contrivances for our protection.

"But now, if the opinion of which I have been speaking be one of encouragement, on which you are justified in proceeding, you will still have a care not to issue your writ until the way is cleared by the ordinary polite letter, framed with all the courtesy of one gentleman demanding satisfaction from another in the chivalrous days of old. This is the period of legal diplomacy. It is at this stage you present, not the pistol, but the olive branch.

"There is much, indeed, in this letter when it is conceived in the spirit of meekness. On the other hand, I have seen this formal epistle stamp the proceedings with a tone of distinguished high-handedness which the jury have marked with their sense of disapprobation. It has, in fact, lost the verdict. There is nothing more foolish than to put yourself in the wrong, and there is nothing more easy. But you may, if you exercise only a portion of the prudence with which nature has endowed most lawyers, put your opponent in the wrong by a judiciously-worded letter at this stage.

"I have noticed that those gentlemen who mean real business are invariably the most courteous in

their mode of demanding (it looks like soliciting) their rights. There is no hurry, no clamor and no claptrap. It is the good, old English fashion of shaking hands before you fight; ‘If I should kill you it is not with malice aforethought.’<sup>1</sup>

§ 230. **Preliminary steps—Mr. Chitty’s questions.**

In his valuable, although now almost obsolete, work, entitled General Practice, Mr. Chitty propounds a series of questions touching the course of a litigation, or preliminary to its inception, which, while some of the subjects to which he refers are discussed in other parts of this work, are properly included at this point, and will be found of value to the practitioner in the preparation of a cause and in its procedure, as well as in advising his client upon the advisability of commencing an action, or of resisting that of another.

Omitting some of the questions, as peculiarly applicable to the English attorney or barrister, and slightly modifying some of the language so that it may conform more closely to the needs of the American practitioner, this summary of Mr. Chitty’s questions may be given :<sup>2</sup>

*For the Plaintiff.*

1st. What was the *right* affected ? Was it public or private ? or was it both ? If private, was it legal or equitable, vested in the party complaining, or in his trustee ? Absolute or relative ; in possession,

<sup>1</sup> Harris’ Before and at Trial, 32-33.

<sup>2</sup> 1 Chitty’s General Practice, 436, note.

remainder, or reversion ? Depending on any and what contract, or without contract?

2d. Was the *injury* private or public, civil or criminal, a tort or a breach of contract ? If the former, was it with or without force, immediate or consequential, a nonfeasance, misfeasance, or malfeasance?

3d. What are the several *remedies*, whether by any and what prevention or removal of the expected injury by the party himself; or the interference of an inferior or superior tribunal ; or by enforcing specific performance ; or compensation by some legal proceeding?

4th. What, if any, *precaution* should be taken to *prevent* the possibility of even remote injury from, or litigation with any unknown party?

5th. Supposing an injury has been threatened or is expected from a particular individual, then is it necessary to take any and what preliminary steps, as to make a demand, before the commencement of any hostile measures?

6th. Can the injury be legally *prevented* or *removed* by any and what proceedings of the party complaining, or by any and what relation or agent, and without the intervention of any constituted authority ?

7th. Can the injury be *prevented* by application to any and what constituted authority, and by what proceedings?

8th. Suppose that the injury has been *completed* by *some* person, has it been barred by any and what statute of limitation, or any presumption of payment, etc.? Is there any mode of preventing such

bar ; and if not, then is there any *criminal* remedy for the same injury?

9th. Is there any and what mode of ascertaining who in particular was the wrong-doer, as by letter or bill of discovery?

10th. Is the complainant the proper party to assert the claim, or under any disability ; and is the wrong-doer liable to be proceeded against, or privileged, or protected?

11th. Is it fit to accept an apology, or to compromise, or to give any and what indulgence, etc., without previous suit?

12th. Is any other step necessary before the commencement of legal proceedings, as giving notice, etc.?

13th. Can specific *relief* or performance be enforced, either at law by mandamus, replevin, or summary proceeding ; or in equity, by bill for specific performance?

14th. Is it *compulsory* or advisable to refer to *arbitration*, and on what terms?

15th. Is the complainant in possession of sufficient *evidence* to support his claim, and if not, how can he obtain it? If not, then how far should that circumstance influence in the choice or abandonment of remedies?

16th. Before what tribunal, or what court, inferior or superior (federal or state), should the complaint be preferred?

17th. By and against whom, or in whose name, should the proceedings be carried on?

18th. What should be the first process, and should the wrong-doer be summoned, or taken on a *capias*?

19th. What are to be the pleadings or statements of the complainant's case, whether at law or in equity, and under what mode of procedure? Is any further statement of facts required for preparing the pleadings?

*On Behalf of the Defendant.*

1st. Has the proceeding been commenced in the proper court; and if not, then can the defendant stop it by a plea to the jurisdiction, or otherwise?

2d. If there be several claimants in adverse rights, should the defendant apply for an interpleader; and under what procedure may he adopt that course?

3d. Otherwise, what is the proper defense, plea, or answer to the complaint?

4th. What should be the subsequent pleadings and proceedings?

*For Both Parties.*

1st. What evidence should be adduced for the plaintiff and defendant? Must any of it be taken by depositions, or on commission? Is a view necessary?

2d. What should be the conduct of the parties toward each other, and their relations touching the case, pending the litigation?

3d. What should be the verdict, judgment or decree, award or adjudication? Whether specially or generally, and for any and what debt and damages.

## CHAPTER XXIV.

### BRINGING THE ACTION, PROCESS AND PROCEDURE.

- § 231. The parties to the action.
- 232. The writ, or summons.
- 233. Service.
- 234. Auxiliary proceedings.
- 235. Attachment and garnishment.
- 236. Injunction.
- 237. Lis pendens.
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- 239. The declaration, statement or complaint.
- 240. The art of pleading.
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- 243. Bills of particulars, and motions to make pleadings more definite.
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- 252. Dr. Warren's advice in this matter.
- 253. Continuance of the case.
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- 255. Subpoenaing the witnesses.
- 256. The jurors and the panel.
- 257. Dr. Warren's advice as to examining the panel.

§ 231. **The parties to the action.**—The forum chosen, the remedy selected, and the cause of action

completed, the next question is to determine the proper parties to the action. It is not our purpose to enter into any extended discussion of this question, as it more properly belongs to text-books on that subject, but a few suggestions may be of value. Usually, the parties are easily ascertained, but there are causes where the success of the action may depend upon the parties who are brought in, either as plaintiffs or defendants. Where there is any election in this matter, the choice may be influenced by many circumstances, all of which are to be considered in reaching its conclusion. As a general rule, an action at law is to be brought in the name of the party in whom the legal right may be vested, but this is generally regulated by the statutes and practice of the several states. So, as regards the defendants, all the parties to a contract who are jointly bound should be joined, in order to save a plea in abatement for non-joinder or misjoinder.

If the plaintiff or defendant is acting in a representative capacity he should be so named. If it is essential that the action shall be brought in the name of a party, other than the one beneficially interested, his written consent should be secured in the first instance; and this relates to actions brought by trustees, executors, guardians, assignees for the benefit of creditors, and the like. There are also cases where a co-executor, co-assignee, partner and others jointly interested, either personally, or in a representative capacity, should be joined.

Again, where the person in whose interest the action to be instituted is not *sui juris*, or is under disabilities, such as infants, persons *non compos*, and,

in some states, married women, the plaintiff must either sue in another name, or join another with him. In some actions, and in some states, it is also necessary that the plaintiff should sue in the name of the commonwealth, or the state, or the people, as the case may be.

In all jurisdictions, it can safely be asserted, the statutes of amendment are so broad and liberal that a misjoinder or non-joinder of plaintiffs, or an omission of a proper party plaintiff, or a misjoinder of defendants, or an error in giving the correct name or title of any of the parties, can easily be remedied; subject, however, to such an imposition of costs, or of terms, as the statute or practice may provide.

**§ 232. The writ, or summons.**—The process whereby the defendant is brought into court varies in the several states. In some of them where the common law practice still prevails, *e. g.*, Pennsylvania, the plaintiff, or his attorney, signs a *præcipe* or order to the prothonotary, or clerk of the court, directing that a writ be issued to the sheriff of the county, commanding him to summon the defendant to appear on a day named in the writ to answer the plaintiff of his plea in *assumpsit*, or *trespass*, or as the case may be. In states where a code of procedure has been adopted the summons may be issued by the attorney for the plaintiff, or his representative.

In all jurisdictions, no matter how differing may be the process, the essential requirements are that the writ, summons or notice must be issued and served in the manner provided by law; without which the defendant is not in court and the process is void. Other requisites are that the writ or sum-

mons should name the court in which the action is brought; the party plaintiff, and the day when the defendant is required to appear; and, when issued by an official of the court, that it should be properly signed and tested, with the seal of the court attached.

§ 233. **Service.**—The three forms of service, generally applicable to all process, are these: personal, by reading the original to the defendant and giving him a copy, or by showing him the original and delivering a copy; by leaving a copy with an adult member of his family at his residence; or, by publication; all these modes of service being regulated by statute, which must be strictly followed. It is also necessary that there should be a return of service; and with an affidavit thereof, if the law so prescribes. In this connection, the privilege of certain persons, or under certain conditions, from service of process is to be considered. In earlier days a *capias ad respondendum* could be issued in many cases, but, since the general abolition of imprisonment for debt, that process is now more rarely used. In some of the states a *capias* can still issue in certain actions, as against fraudulent debtors, and in some actions of tort, such as libel, slander, etc.; all of which is regulated by statute. Where such process may issue, an affidavit and, usually, a bond are required from the plaintiff.

§ 234. **Auxiliary proceedings.**—It is of frequent occurrence that more than a summons is necessary to effectively secure the plaintiff's rights. If the defendant is a non-resident, or is fraudulently removing his property, it may be necessary to place it *in custodia legis* by attachment; or it may require an

injunction to restrain the defendant from doing some act which would prevent the plaintiff from obtaining redress in an action at law ; or it may be necessary to give notice of the pendency of the action to preserve the plaintiff's rights as against third parties. These proceedings are of a nature ancillary to the main action, and involve processes distinct from, or auxiliary to, that action.

§ 235. **Attachment and garnishment.**—An attachment is a statutory remedy, and must strictly follow the requirements of the statutes. The practice in this differs in the several states, but the general process is the taking into custody of the law the debtor's real or personal property, to secure the interests of the creditor pending the determination of the cause. It is largely a proceeding *in rem*, but may, under certain conditions, like the entry of bail by the defendant, become an action *in personam*. An almost universal requirement for an attachment is an affidavit of the existence of the statutory ground, and, generally, a bond from the plaintiff. A garnishment is a process of a nature similar to an attachment, and is a taking of the property of the defendant in the hands of a stranger, or securing debts due from a third person to the debtor of the attaching creditor.

§ 236. **Injunction.**—While an injunction is not, strictly speaking, an auxiliary proceeding, there are cases where it is of important value in assisting the chief action, and is an extraordinary remedy of great power. In the jurisdictions where the two systems of law and equity are separated, the remedy by injunction is much less an auxiliary process ; but in the code states the relief sought by injunction may be ob-

tained in the main action. The true test of the right to an equitable remedy seems to be whether it is necessary to secure rights which can not be had in an action at law; or, more broadly, whether the legal remedy equals, in its essential elements, the equitable one. The primary grounds for an injunction seem to be that the complainant has made a clear and strong case entitling him to its assistance, and that his application therefor is supported by proper affidavits, and, usually, will not be granted except upon sufficient bond given by the complainant.

§ 237. **Lis pendens.**—In many of the states certain actions are accompanied by a *lis pendens* notice. This applies to cases where property, real or personal, is directly involved in the litigation, and does not apply to actions purely *in personam*, where the only relief to be obtained is a judgment for a money recovery. Under the older common law and equity proceedings, the filing of a declaration, or complaint, containing a sufficient description of the property, together with proper service and return, is notice to subsequent purchasers. Such was the rule, and still is, in some of the states, in actions of ejectment. But in many of the states this is not enough in certain actions, for the pleadings must be supplemented by written notice, registered or recorded in the proper office. This *lis pendens* notice is regulated in those jurisdictions by statute, and its requirements must be strictly followed. The essential part of the notice is a proper and sufficient description of the property to which the action directly relates.

§ 238. **Appearance.**—It is advisable that the lawyer should have from his client a warrant of attorney

ney, or authority to appear in a cause. His right to so appear will be presumed ; still, the contrary may be shown. His commencement of the action is in itself an appearance by the plaintiff's counsel ; but that of the attorney for the defendant should be formally entered of record ; although it is generally held that taking any part in the cause, such as filing an answer, or a demurrer, or a motion, or appearing at the trial, or an appeal for a party, is equivalent to a formal appearance.

It is sometimes useful to enter a special appearance, which is qualified or limited, and is made for a special purpose, rather than a general appearance, which may waive all defects and irregularities in the process or service, and gives jurisdiction over the party for whom the attorney may thus generally appear, and is held to be equivalent to personal service. The special appearance does not waive jurisdiction of the person, and defects or irregularities in the process, and is usually had to take advantage of those defenses. Such an appearance should be carefully guarded, and must be made in accordance with the rules of practice of the court wherein it is entered.

**§ 239. The declaration, statement or complaint.—** Now, probably, in all the states, the more modern form of pleadings prevails with regard to the declaration, statement or complaint ; the old system of special pleadings having become obsolete, or having been abolished. In more ancient days pleading was a great art, and required such nicety of language, and such particularity in the formal statements, that many a cause was lost for want of some purely formal matter ; but, in these days, the reforms in legal proced-

ure have materially altered the old rules of pleading, and greatly simplified the labors of the lawyer in that direction. The famous work of Mr. Chitty on pleadings has become less and less useful, until, now, it is rarely used. An examination of its many forms at once gives an idea of what was required of the lawyer of those days.

So, again, the statutes of amendments have greatly assisted the furtherance of justice, and that which at one time would have been a fatal defect in the pleadings is now almost universally subject to be amended, and the faults therein remedied without serious loss. However, fear has been expressed that this laxity in the rules of pleading, under the modern practice, may tend too much to slovenly and careless habits, and lead to the injury of the defendant, by not requiring the plaintiff to disclose that to which the defendant is entitled, a full knowledge of the grounds upon which the action is founded, with an opportunity to prepare and present his full defense.

**§ 240. The art of pleading.**—While pleading has lost many of its technicalities, it still retains that for which it has ever been distinguished, the elements of pure logic. The purpose of the declaration, or complaint, as well as its requirement, is a statement of the plaintiff's claim made in so clear and distinct a manner that the court can readily see that the defendant has done him a legal injury, if the facts therein stated are verified, and the law gives him therefor a remedy and redress. This statement should not only be clear, but it should be concise; excluding all foreign and extraneous matter, and confined to the cause of the action it sets forth.

It is wise to state the case in a chronological order, giving the facts in the order of their occurrence, and logically following them to their conclusion. Dates, amounts and material forms of expression should be given in such precise language as to avoid any variance between the pleadings and the proof. If a copy of any document is included in the pleadings it should be correctly given. Here accuracy is a cardinal virtue, and a want of it may subject the client to unnecessary costs and inconvenience. It is unwise for the plaintiff to state more of his case than is necessary, because he may thereby be led into admissions dangerous to his success, or may inform his adversary of more than is required from him. Thus, in actions on accounts, particularly if there is any doubt or difficulty regarding the items of credit, it is often best, if not forbidden by the practice or by statute, to state the debit side only, leaving the defendant to prove his credits.

**§ 241. What is to be avoided in the declaration or complaint.**—The things to be avoided by the lawyer in drawing his declaration, statement or complaint, are these; an admission which may prove fatal or injurious to his client; a variance between the pleadings and proof; and the possibility of a successful demurrer. If the latter goes to the very root of the case he may not be able to draw his pleadings without subjecting him to a demurrer; but, usually, it can be so framed that it can be avoided.

The declaration or complaint should be honestly stated. By this is meant that it should be based on substantial facts, and the amount claimed not very greatly in excess of that which can be proven. If

the evidence falls very far short of the damages or value claimed in the pleadings, the jury may look with distrust upon the plaintiff, and be led to believe that his demand is not entirely honest, and so mete out to him but scant favor.

Mr. Harris' advice in this particular is worth following. "Asking an unreasonable amount of damages is a sure way of throwing discredit on your claim. Tact rules the world, and nothing shows a greater want of it than to begin an action with an exaggerated demand. To excuse yourself by saying it is a matter of form only intensifies the blunder. There can be no mere form in a statement of damage ; it is either honest or false, and the apparent honesty or the apparent dishonesty will guide the intelligence and verdict of the jury. Of course, one has known this mistake to be overcome, and damages obtained proportionate to the injury ; but the solicitor who starts with the burden of a false claim, or of exaggerated damages, has need of all the tact and ingenuity which characterize the most skillful and persuasive advocate, in order to pull his client through the difficulty.

"The less form and the more reality the better. The best actor is not the man who acts most, but the one who acts least ; and the best advocate is not the man who is, but who looks most real ; but he'll need all his looks if his claim is a fraudulent unreality."<sup>1</sup>

**§ 242. The defendant's plea, answer or demurrer.** —When called upon to reply to the plaintiff's cause of action, as set forth in the declaration or complaint,

<sup>1</sup> Harris Before and at Trial, 35.

or, perhaps, earlier in the action, the defendant often has a variety of courses to pursue, among which he may have more than one choice, and may follow one, and afterwards take another. While this is not the place for any lengthy discussion of defenses, or of the means which the defendant may have to bring the case to an end, a few suggestions to his attorney are now offered.

He may take into consideration one or more of the following questions in defending his client

*First.* Is the process, service, etc., defective on its face ? If so, the ordinary mode is to enter a special appearance, if allowable, (in some courts known as an appearance *de bene esse*) and move to quash the writ or to set aside the service or return. Such objections should specifically point out the defects complained of.

*Second.* Is the process defective for want of something not appearing on its face ? For example, non-joinder or misjoinder. If so, a plea in abatement will raise the question, which is always founded upon affidavit.

*Third.* Is the person served privileged or exempt from service of process ? If so, a motion to set aside the service is proper. This would apply, for example, to the case of a suitor or witness served while in attendance at court, or within the reasonable time allowed him in going to or returning from the trial, or to a service obtained by fraud.

*Fourth.* Admitting the facts set forth in the plaintiff's declaration, statement or complaint, does the law give him a remedy ; or is he entitled to one in that action ? If not, a demurrer is in order. But

the defendant should think twice before taking this step, as he may subject himself to a judgment for the amount in controversy (so, possibly, in some jurisdictions) or, at least, make himself liable for costs if unsuccessful. In addition, by a demurrer he makes known to his adversary, his legal positions, warns him against the argument at the trial of the cause, and thereby forearms his antagonist. A demurrer may, sometimes, quickly end a case, but it is a dangerous weapon, and may prove to be a two-edged sword in the hands of the defendant. It certainly should not be resorted to except in cases where the defendant feels confident of sustaining it.

*Fifth.* Is the declaration, statement or complaint sufficiently definite, or particularized, to enable the defendant to properly answer or plead? If not, the defendant should follow a practice prevailing, it is believed, in all the states, and compel the plaintiff to furnish a bill of particulars of his claim or cause of action, or make his complaint more certain and specific.<sup>1</sup>

*Sixth.* All other preliminary pleadings and motions disposed of, there remains the answer, or plea, to the plaintiff's complaint or declaration. While in some courts, and in certain cases, short pleas are still used by the defendant, under the practice of all the states a process can usually be had whereby the defendant may be compelled to disclose his defense. Whether this is by formal sworn answer to the complaint, or by an affidavit of defense to the plaintiff's statement, or even by short pleas under the old common law

<sup>1</sup> *Infra*, § 243.

practice, the result is approximately the same. All this is so regulated by the practice of the several states as to be impossible of any extended discussion here. The tendency of the modern practice of the law is to compel the defendant to fully set forth the ground of his defense, as well as to require the plaintiff to define his cause of action, in order that both parties may have an opportunity to know the issues which are to be tried without the surprise of a new defense or claim when the issues are brought up for adjudication.

**§ 243. Bills of particulars and motions to make pleadings more definite.**—As we have said in the preceding section, the trend of the modern practice is to compel the parties to an action to fully set forth the grounds of their action or defenses. In some jurisdictions, this is secured by a rule for a bill of particulars where the pleadings are in general terms, and in others by a motion to make the complaint or answer more certain and specific.

As a general rule, the parties are confined to these bills of particulars in the production of the proofs, although they are amendable as are all pleadings. Their value to the defendant, in preparing his answer, and to the plaintiff, in securing a definite defense from his adversary, are apparent, and should always be required when deemed necessary to a proper understanding of the case. They are often of use to the defendant in speedily bringing the plaintiff's case to an end, as it sometimes happens that the plaintiff's action is based upon such uncertain grounds that it can not stand the test of this rule or motion.

Under the practice of some jurisdictions, it may

be needful for the defendant to obtain a stay of proceedings during the pendency of his application for a more specific declaration or complaint, in order that he may not lose his opportunity to plead to the merits of the cause.

Allied with this subject, and to be remembered, is the right to oyer of an instrument upon which suit is brought, and also to its inspection. This may sometimes be vitally important to the party demanding it, as we shall see in a succeeding section discussing this matter more at length.<sup>1</sup>

**§ 244. The issue.**—The pleadings of the parties to a cause will disclose the issues to be tried, and must, therefore, be carefully examined, and then compared together to precisely determine the questions at issue. When the answer or defense has been made to the declaration or complaint, the allegations of the plaintiff, as replied to by the defendant, can be put into three classes :

- 1st. Those which are admitted.
- 2d. Those which are neither admitted nor denied.
- 3d. Those which are denied.

As for those admitted, the plaintiff must determine the extent of the admission, and how far they tend to support the main issues. So, as to the allegations which are neither admitted nor denied, as well as those positively denied, it is necessary to note how far the answer goes, and what proof is necessary to verify them. In short, the pleadings should be carefully digested, so that from them the issues raised may

<sup>1</sup> *Infra*, § 248.

be clearly understood, and made ready to be pointed out at the trial.

On the one hand, the plaintiff must be prepared to prove the allegations not admitted by the defendant by proof in accordance with those allegations, as well as to deny the affirmative answers of the defendant by that or other proof. The latter must be prepared to bring evidence in denial of the plaintiff's allegations, not admitted by him, if material to the action, and equally ready to prove all the affirmative averments of his defense, and as he has averred them. In other words, the proof should conform to the allegations, and to properly do this the issues must be thoroughly understood. The real issues of a cause are not always clearly apparent from the pleadings, but to accurately ascertain them, and to know distinctly what is to be tried, is the positive duty of the advocate. This knowledge should be secured long before the case comes into court, for ignorance of the real questions at issue is almost certain to lead to defeat.

**§ 245. Depositions.**—It is very certain that the oral evidence of a witness in a trial of issues of fact before a jury is much to be preferred to his written depositions. Seeing the witness and noting his manner is much more telling with the jury than the effect produced upon them by merely reading his evidence from a deposition; it goes deeper into their minds, and remains more firmly fixed in their memories. Again, the witness himself will more readily remember and suggest matters of importance when in the court room, where his mental powers are excited by a contest in which he can hardly fail to

have some interest, than when he gives his evidence in the quiet of an examination by deposition.

It is only when the attendance of a witness can not be secured at trial that his testimony should be taken in this way. Frequently, owing to the absence or infirmity of a witness, this course is necessary, and, under some circumstances, it may be required to be done by formal interrogatories. These interrogatories should be prepared by the counsel who is most familiar with the issues of the case, and, when the testimony is taken by deposition, the attorney should be present and conduct the examination, rather than to delegate it to others not so well acquainted with the cause and its issues. The rules governing the taking and return of depositions, and of commissions or interrogatories, and prevailing in the jurisdiction where the cause is to be tried, must be strictly followed, and the counsel for the party against whom they are taken should be prepared to introduce his objections to any violation of those rules at the time, and in the manner, required by the practice of his courts.

**§ 246. When secondary evidence of writings is permitted.**—It is a well-known rule that the best evidence which can be secured must be presented, and that this primary evidence must be produced, or its absence accounted for, before secondary or inferior evidence will be permitted. If original documents have been in the possession of the party desiring to offer them, and copies or oral evidence of their contents are to be given in their place, it is incumbent upon him to first lay the ground for their admission, by showing that diligent search has been

made for the originals, and that they can not be found, or that they have been destroyed. There are these exceptions, among others of minor note, to the rule requiring the production of the original instruments:

1. A public officer need not produce the certificate of his election or appointment.
2. Certified copies of public records are admissible in the place of the originals, when the law authorizes such instruments to be recorded and the record preserved.
3. Where only a calculation of an intricate or voluminous account is needed, a qualified witness may make such a computation, and testify thereto.
4. Inscriptions on immovables, such as on walls, buildings or tombstones, may be proved by oral evidence.
5. Where writings are not within the jurisdiction of the court, and can not be reached by its process, parol evidence of their contents is admissible.
6. Where their production is made impossible by reason of their loss or destruction secondary proof can be introduced.
7. Or when the opposite party has them in his possession, and fails to produce them after due notice.
8. And where they are in the hands of a stranger, who can not be compelled by the process of the court to produce them and declines to do so upon proper demand.

**§ 247. Compelling the production of documents.—** There are three ways to compel the production of writings when in the possession of the adversary, or of persons amenable to the process of the court:

1. By notice to the other party or his attorney of record.
2. By order of court, on proper petition and cause shown.
3. By subpœna *duces tecum*.

The notice to produce such documents should be served upon the party, or his attorney of record, within a reasonable time before the trial ; it should reasonably describe what is demanded to be produced ; it should be in writing ; and its service must be always ready to be proven.

**§ 248. Oyer or inspection of documents or books.**—There are cases where it is important to secure an inspection of the books or documents of the opposing party, and forming part of the evidence in the cause, before the case is tried. The advocate may thus be enabled to discover alterations, interlineations or forgeries, of importance to his cause, and, perhaps, essential to its proper trial. In fact, a case has been thoroughly prepared only when counsel has had an inspection of all the documents which will be introduced in evidence by both parties. His client may not have duplicates of these documents, and when it is important that they should be seen, as it usually is, a course should be adopted to secure that inspection. This is regulated by the local practice, but, generally, and upon cause shown by proper petition, the court will compel the other party to permit an inspection of such documents as are essential to the preparation or evidence of the case. The wisdom of permitting the adversary to see such papers, without being forced to produce them under an order of court, is at once apparent, as a refusal of the right

to such an inspection might be severely commented upon at trial, and, possibly, prove detrimental to the party withholding them.

**§ 249. Inspection of persons and things.**—There are cases where it is important that an inspection should be secured before trial of persons or things. Thus, in an action for personal injuries, the plaintiff may be compelled to submit himself to an examination by physicians or surgeons, employed by the defendant, to ascertain the extent of the injuries. The rulings of the courts upon the question of the right of a party to compel such an inspection are far from uniform. In the absence of a statute upon the subject, it has been denied in some jurisdictions, and permitted in others.<sup>1</sup>

**§ 250. Views by the jury.**—In some of the states a process has been provided for a view by a jury, before the trial, and struck for that purpose, of places or things connected with the issues to be tried. This practice is regulated by statute, and its provisions must be closely followed. How far this course may be of value to the parties is problematical. While the object of a view is to enable the jury to understand the evidence, and to properly apply it, it is not intended that new evidence should thereby be collected by them. This, however, is just what they may secure, and the ideas and information so gained by them may be prejudicial to a proper verdict in the cause.

The dangers to which a case may be thus subjected have been pointed out in a leading decision. “In au-

<sup>1</sup> See cases on this subject collated in 2 Elliott’s General Practice, §§ 683–684, notes.

thorizing the court to send the jury to view the premises in litigation, it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land, but only to enable them more clearly to understand and apply the evidence. If the rule was otherwise, the jury might base its verdict wholly on its own inspection of premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without remedy by a motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury, as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict in the evidence. The cause would be determined, not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors, founded upon a personal inspection, the value or the accuracy of which there would be no method of ascertaining. The statute could not have been intended to produce such results as these."<sup>1</sup>

**§ 251. The danger to the defendant in forcing a case to trial.—**There is no doubt of the wisdom of the plaintiff in bringing a case to trial after it has been prepared, but it is equally certain that the defendant should use caution in this matter. It may be that he will have a verdict against him in a cause which he has hurried forward, while if he had let it alone it might have died a natural death. The writer

<sup>1</sup> *Wright v. Carpenter*, 49 Cal. 607, 609.

remembers, only too vividly, a sad experience he suffered in the days of his novitiate. A defendant had obtained his services in an old case, which, although he felt sure of success, it is doubtful if the plaintiff or his counsel had not practically abandoned. With the enthusiasm of youth he ruled the plaintiff to declare, and thus brought the case to trial, which resulted in a verdict for the plaintiff for about \$1,200. Smarting under what he considered to be a gross miscarriage of justice, the youthful attorney sought and obtained a new trial. Its result was still less comforting, as it gave a verdict against the client for more than \$1,700. Since that time that lawyer has hung up in his mind, well-framed by experience, the motto, "Let sleeping dogs lie."

**§ 252. Dr. Warren's advice in this matter.**—Dr. Warren gives some excellent advice on this subject: "Beware, when concerned for the defendant, how you force on a reluctant plaintiff. It is almost proverbial that a defendant, by doing so, only helps on a plaintiff to a verdict which he would not otherwise obtain, and has become afraid of even asking for. I have known between twenty and thirty instances of this in my own practice; not that I ever advised it, for I almost invariably discountenanced it, as, I apprehend, does every practitioner of even only moderate prudence and experience. In a case of this sort, before that great lawyer and eminent judge, Lord Tenterden, as soon as it had been intimated to him, on the plaintiff's obtaining a verdict, that he had been ruled on by the defendant, his lordship leaned down to the defendant's attorney, who was sitting with a rueful countenance beneath, and whispered:

'So they tell me you ruled on the plaintiff? Well, you will know better another time. You are but a young man; and I will tell you, that when young at the bar, I, too, once advised a client as foolishly as you have advised yours, but I never did so again. Nor do you.' There certainly does seem a fatality about these cases. I own, however, that there are occasions on which you are forced to take this step; when the case is really clear beyond all possible doubt, or you are concerned in winding up affairs which can not remain unsettled through actions pending. Under such circumstances, you must needs take your chance."<sup>1</sup>

**§ 253. Continuance of the case.**—While a party should always be ready at the appointed time to try his cause, and, as a general rule, it is bad policy to ask many continuances, it is true that there are cases when such a course is advisable. Such, for example, is the continuance of a criminal prosecution secured on behalf of a defendant, when the crime has aroused indignation, and there is a public clamor for conviction. A delay in such cases may secure a fairer trial and better justice for the accused.

In civil cases it may be needed when a new or additional cause of action or defense has been added, without time for proper preparation, or a material witness is absent, and due diligence has been used to secure his attendance, and for other causes which may be the proper subject for continuance. The time for such an application, and the manner in which it is to be made, are, generally, controlled by the rules

<sup>1</sup> Warren's Duties of Attorneys, 197.

or practice of the forum, and are usually within the discretion of the court, and subject to reasonable conditions, such as payment of costs, or the like.

§ 254. **Change of venue.**—In nearly all the states there are statutes prescribing a change of venue, whereby the cause may be tried in another county. Among the grounds for this relief are these: prejudice of the citizens, where the venue is laid, preventing a fair and impartial trial; the convenience of witnesses, or the fact that the county itself is a party. In certain instances, the granting or refusal of a change of venue is within the discretion of the trial judge, but some statutes afford grounds for this transfer of the case which can be enforced by mandamus, but, in other jurisdictions, have been held to be reviewable only on appeal. In all cases the provisions of the statutes must be strictly observed.

It is also generally provided by statute that a removal of the cause may be had from the jurisdiction of the judge assigned to hear it where there is proof, or, sometimes, mere allegation, of his unjust bias or prejudice; or where he is of near relationship to one of the parties; or has been of counsel in the cause; or is a material witness.

§ 255. **Subpoenaing the witnesses.**—The witnesses should always be subpoenaed, and not depended upon to appear by their promises alone. The subpoena should give them timely notice of the date and place of trial, and should be regularly served, unless service has been accepted. It is also wise to include in the subpoena both the names and residences of the witnesses that they may be readily found when required. In order to enforce their attendance, the

legal fees and the expenses given the witnesses by statute should be tendered.

Subpoenas are necessary to secure an attachment to compel the attendance of witnesses, as well as to obtain a continuance of the cause for their unavoidable absence. In the latter case, it is usually necessary for the party moving for the continuance to show that the witness has been subpoenaed, that he is material and necessary to his cause, and, if he is detained by sickness, or other good cause, that there has been no opportunity to take his depositions, accompanied, in the instance named, by the affidavit or certificate of his physician that illness prevents his attendance.

**§ 256. The jurors and the panel.**—Before trial the counsel should go over the panel of jurors by whom his case is to be tried, and ascertain who should be challenged, and whether peremptorily, or for cause. In this he needs his client's assistance, and should learn from him who would be likely to be prejudiced against him or his case. This work should not be left to the hour when the jury is called into the box, but should be done beforehand. There are many cases where there has been a total miscarriage of justice owing to the unjust prejudice of the jurors against the losing party, or *vice versa*. Much of this can be avoided if counsel would give some attention to the panel before the case is called. It may be necessary to go into an extended inquiry into the characteristics and connections of the jurors, but often that labor is well rewarded by the final success, which could not otherwise have been secured.

The writer has in mind his experience in a cause

tried in a federal court, where nearly all the jurors were unknown to him or to his client. Fearing a prejudice against his client, by reason of his race, he made a thorough investigation into the character and business of the members of the panel, and found several whose prejudices would have been fatal to success had they been permitted to sit in the cause, and was thus enabled to properly challenge when the jury was called into the box.

**§ 257. Dr. Warren's advice as to examining the panel.**—Dr. Warren thus refers to this subject: “Look sharply after your jury panel. Otherwise you may have, as one of your judges, one whom no evidence, no arguments, would persuade to give your client a verdict; one who may be his personal enemy, or the friend, or relation, of your opponent; or may belong to some trade, profession, or calling, which would be injuriously affected by your success; or enjoy rights in respect of property situated similarly with that which you seek to affect with liability. One of the present chief justices, a man of great experience, consummate prudence, and singular success in the conduct of causes, when at the bar, gave me a hint of this kind in the very first cause in which I ever held a brief with him. ‘Observe,’ said he, ‘what I am going to do, and do you the same when your turn comes. I am going to look at the jury panel, that I may quietly get rid of some obnoxious jurymen. Here our opponent is a publican, and the case is one in which all publicans are likely to feel a strong bias in his favor. Now, peradventure, there is a publican in the jury-box—but perhaps our client has already seen to this.’ That gentleman,

however, on being asked, acknowledged that ‘he had not thought of it’; on which my leader, in a whisper to the usher, told him to get the jury panel from the officer; and, on looking over it, sure enough, there were two publicans quietly ensconced in the box, having, doubtless, had a hint from our opponent to be in attendance when the cause was called on. If this has been the case, however, the trick failed; for the two obnoxious gentlemen were quietly invited to retire—not knowing at whose instance—and their places were immediately filled by others, who appeared indifferent to either party. The gentleman to whom I am referring attached such importance to this precaution, and said that he had seen so many instances of mischief arising from a neglect of it, that he told me he thought an attorney who disregarded it guilty of *crassa negligentia*. Only the other day I saw at Guildhall, the brother of the defendant upon the jury. And a friend, to whom I this morning, in court, mentioned this circumstance, as one of which I intended to bring before you, assured me that he himself almost fancied that he recollects, some years before, seeing the plaintiff sneaking into the jury-box.”<sup>1</sup>

<sup>1</sup> Warren’s Duties of Attorneys 192.



## PART IV. THE TRIAL OF CAUSES.

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### CHAPTER XXV.

#### THE ORDER OF THE TRIAL.

- § 258. The eve of trial.
- 259. Compromises often offered at this time.
- 260. The situation of those about to take part in a trial.
- 261. The order in which a case is tried.

§ 258. **The eve of trial.**—His cause thoroughly prepared, both in law and fact, his witnesses subpœnaed, and everything in readiness for the battle, the lawyer at the eve of trial, particularly if he is a beginner, is in a situation where every nerve is strained, and every thought turned upon the chances of his success, and the means he has to secure it. If there is any period in his practice when he needs to summon to his help his full powers of self-possession and courage, it is just at this time. When the cause is partly under way, and he is well in the saddle, much of this timidity and nervousness will disappear, but now, just as he is about to sit down to try his case, he feels a trepidation and suffers an agitation which are far from pleasant. As he grows more experienced he will be relieved of much of this, still, he is always likely to feel himself subject to some of this strain at the hour his cause is about to begin.

**§ 259. Compromises often offered at this time.—** This is the time when a compromise is often offered, but certain is it that the situation the lawyer is then in should not be permitted to have any influence upon his judgment in that matter. It is far better to have settled in his mind, and with his client, at the period of the preparation, when his faculties are under a less tension and he is more composed, what terms of settlement would be accepted, and to now abide by that determination, rather than to trust to the feelings that are apt to agitate him on the eve of trial. A cunning antagonist, shrewdly guessing that the young lawyer opposed to him is now frightened and nervous, will sometimes approach him with an offer of compromise much different from the terms he is willing to make, trusting to the situation of the youthful practitioner to obtain this favorable settlement. It is now that the novitiate needs to have control of himself, and must not permit his timidity, or the novelty and difficulties of his situation, to control his judgment.

**§ 260. The situation of those about to take part in a trial.—** Mr. Chitty has described, almost dramatically, the situation of all the parties connected with the trial of a cause, just as it is called to be heard. "There is not perhaps any scene in life, which, though of daily occurrence, excites so many various interests and talents as a contested trial at law. The parties, their attorneys and witnesses, the counsel, the jurors, and even the learned judge, (though in very different degrees, and influenced by very different feelings and motives) all are deeply

interested, and excited either by the matter in question or the manner in which it is to be conducted.

"The parties, at all events, are deeply interested either in the value of the subject in dispute, or the costs, or exposure of character, incident to public investigation. The respective attorneys participate in the same feeling, and are influenced by the apprehension that the result of the case may in some measure affect their professional character, either on account of the inexpediency of the proceeding, or of the defense, or the want of skill in conducting or defending it. The witnesses, whether or not (as is too often the case) influenced by relationship, friendship or secret interest, or by political or party feeling, are, at all events, anxious to acquit themselves with credit in court. The junior counsel is excited in no small degree, lest his laudable desire to advance in his profession may be marred by some inadvertency in framing the pleadings, or in his examination of the witnesses, or that he may, in some state of the cause, incur the disapprobation or displeasure of his leader, or even of the judge, which might prejudice him in subsequent causes. The leading counsel, however justly confident in his knowledge of law and great experience in *nisi prius* tact, may yet well be nervous and apprehensive that he may not present the particular case to the judge and jury in the most favorable manner for his client, or that he may omit some material point, or may miscalculate by calling too many or too few witnesses, or fail in the want of adequate energy in his address to the jury, or in some other mismanagement of the cause. Each of

the jurors also, if alive to his duty, should feel no inconsiderable anxiety to forget or not be influenced by any previous or sudden prejudice, and to suspend his judgment until the case has been closed and he has heard the observations of the judge. The learned judge, however experienced, can not be entirely free from apprehension that he may fail in the due fulfilment of his very arduous duties, or may misapprehend some rule of law or its application to the particular case, or may draw an incorrect conclusion as regards the evidence, or that his misstatement to the jury may mislead them and become the subject of an expensive application to the court for a new trial, or occasion a bill of exceptions or a demurrer to evidence.”<sup>1</sup>

**§ 261. The order in which a case is tried.**—While the writer, in describing the order of the trial, may not give it in the sequence observed in all jurisdictions, he believes it is substantially the same everywhere.

The case called for trial, the following steps are taken :

1. The jury is selected from the panel, usually by lot, and each party may then exercise his right to challenge, either peremptorily, or for cause.

2. The plaintiff’s counsel then opens his case to the jury, unless the burden of proof is upon the defendant, and he has been accorded the privilege of opening.

3. The witnesses for the plaintiff are first examined, and are subject to cross-examination by the defendant, and may be re-examined by the plaintiff.

<sup>1</sup> 3 Chitty’s General Practice, 867.

4. The case for the plaintiff rested, the defendant has open to him, before proceeding with his evidence, a motion which is variously named:

- (a) For a compulsory non-suit.
- (b) To dismiss the case.
- (c) A demurrer to the evidence.

All, however, have the same effect and are founded upon similar grounds, the object being to dispose of the case upon the legal position that the plaintiff can not recover, even admitting his facts to be true.

5. Omitting or failing to do this, the defendant then opens his case to the jury and introduces his evidence as did the plaintiff.

6. The plaintiff may then offer rebutting evidence to new matters raised by the defendant, and, sometimes, the latter is entitled to a sur-rebuttal.

7. The evidence closed, the parties present their points, or requests for instructions, raising the law of the case.

8. These points are argued to the court, the plaintiff opening and closing that argument.

9. The defendant's counsel then addresses the jury and is followed by the plaintiff; the rule being that he who has the burden of proof can both open and close to the jury.

10. Then follows the charge of the court, with the answers to the points, or requests for instructions, and then comes the verdict.

11. If this does not end the cause, a motion for a new trial and an appeal, or either, are taken by the unsuccessful party.

It is proposed to discuss these subjects, and in the order named, in this part of our work.

## CHAPTER XXVI.

### S E L E C T I N G   T H E   J U R Y .

- § 262. The panel.
- 263. The qualifications of a juror.
- 264. Persons exempt from jury service.
- 265. Challenges to the array or panel.
- 266. Peremptory challenges.
- 267. Challenges for cause.
- 268. Grounds of challenges for cause.
- 269. Personal hostility or actual bias.
- 270. Grounds for exclusion of a juror for bias.
- 271. Exclusion by reason of a formed or expressed opinion.
- 272. Trying challenges.
- 273. When the right to challenge has been waived.

§ 262. **The panel.**—The preparation of the lists of qualified persons for jury service is regulated by the statutes of the several states, as is the making up of the panel for the trial of causes at the several sittings or terms of the court. In some states, the lists are made up by special boards; in others, by an officer of the court, such as the sheriff, in conjunction with other county officers, like jury commissioners; and in others, by the town authorities to whom the *venire* is issued for that purpose. In the federal courts, the practice is regulated by the act of congress of June 20, 1879, requiring the juries to be drawn from a box containing the names of three hundred persons,

placed therein by the clerk of the court, and by a commissioner appointed by the judge, the clerk and the commissioner being of opposite political parties. From these jury lists the panel is drawn, who are summoned to attend the court at a special session, and from that panel is chosen the twelve who are to sit in the trial of each cause.

**§ 263. The qualifications of a juror.**—The qualifications of a juror are regulated by constitutional provisions or by legislative enactments. Three requisites are almost universally prescribed ; the juror must be a citizen of the county, a male above the age of twenty-one years, and shall enjoy the elective franchise.<sup>1</sup> In some of the states he must also be possessed of an estate of a certain value, and in others he must be a householder.<sup>2</sup>

**§ 264. Persons exempt from jury service.**—Certain persons have the privilege of being exempt from

<sup>1</sup>In Arkansas it is held that a resident in the county, and a citizen of the state, is competent to serve as a juror, although his residence has not been of sufficient length to confer upon him political privileges. *Anderson v. State*, 5 Ark. 444. See also *State v. Francis*, 76 Mo. 681. In *United States v. Nardello*, 4 Mackey (D. C.) 503, it was held that a juror was qualified as a resident of Washington to sit in the trial of a case in the District of Columbia, because he lived in that city, although he spent his vacations and voted in Virginia. *Quaere*, would he be a qualified voter in that state? It was held in Nevada that a qualified voter who had not paid his poll tax or had been registered, although the time had not expired within which to perfect his registry, was not rendered incompetent to sit as a juror. *State v. Salge*, 1 Nev. 455.

<sup>2</sup>New York, Virginia, North Carolina and New Mexico require the juror to be possessed of property. In Texas, Mississippi and Alabama, he must be a householder. In Indiana he must be both a freeholder and a householder.

jury service ; those exceptions relating to age, occupation, previous service, and mental or physical infirmity. Those who are freed from this duty by reason of their occupations include attorneys at law in active practice, clergymen, physicians, public officers and court officials, justices of the peace, constables, professors and teachers in colleges and schools, and their students and pupils ; as well as others whose employment is of such a nature as to discommode the public were they to be compelled to do jury service ; such are railroad, steamboat, telegraph, telephone and incorporated bank officers and employes, mail agents, and public stage drivers. But these exceptions are personal privileges which may be waived by those to whom they apply, and do not operate as such disqualifications as would be ground for challenge by the parties to an action.

§ 265. **Challenges to the array or panel.**—At common law, such a challenge was confined to the partiality or some default in the sheriff who arrayed the panel ; but, with the enlargement of the processes of selecting, drawing and returning the jury lists, the grounds for challenging the array have now been enlarged until it may be stated, as a general rule, that any want of statutory form, properly and seasonably presented, would be cause for quashing the panel. In many of the states there are statutory enactments regulating and providing for challenges to the panel. Such challenges are much more common in criminal than in civil causes, and while often made in the former are usually unsuccessful.

§ 266. **Peremptory challenges.**—While at common law the right to challenge peremptorily was confined

to criminal cases, this privilege has now been extended in most of our jurisdictions, if not in all, to both civil and criminal causes; the number of such challenges being regulated by the statutes of the several states. In the United States courts, under the provisions of section 819 of the revised statutes, in treason and capital offenses, the prisoner is entitled to twenty, the government to five, peremptory challenges; in other felonies the former has ten, the latter three; in all other cases, civil or criminal, each party has three.

In the state courts, the number of such challenges approximates to the practice in the federal courts in criminal trials, and, in civil cases, ranges from two to one-fifth of the number of jurors.<sup>1</sup> The right of each defendant in criminal trials, where two or more are indicted and tried together, to the full number of peremptory challenges, in the absence of a statutory provision, has been variously adjudicated; but it seems to be the better authority that where the statute gives such challenges to "every person," it can be exercised by every defendant; but where the right is extended to "each party," or to "either party," that only the full number can be allowed to all the defendants.<sup>2</sup>

In civil cases it seems to be settled that when there are several defendants, making a common and joint defense, they have collectively only the same num-

<sup>1</sup> See the statutes collated in 12 Am. & Eng. Encyc. Law (1st ed.) 347. Title "Jury & Jury Trial."

<sup>2</sup> Thompson & Merriam on Juries, § 162; *United States v. Hall*, 44 Fed. Rep. 883; *Moschell v. State*, 22 Atl. Rep. 50; *State v. Stoughton*, 51 Vt. 362; *Contra, Savage v. State*, 18 Fla. 909; *Wiggins v. State*, 1 Lea (Tenn.) 738.

ber of peremptory challenges to which one defendant would be entitled.<sup>1</sup> But where the defendants plead separately, are each represented by counsel, and different verdicts may be rendered against the several defendants, each one is entitled to the statutory number of such challenges.<sup>2</sup> So, also, where several actions by the same plaintiff have been commenced, and afterwards consolidated under a common defense, each defendant is entitled to the full number of challenges.<sup>3</sup>

**§ 267. Challenges for cause.**—The ancient division of challenges for cause into principal challenges, and those to the favor, no longer exists. The distinction lay in the mode of trying such challenges, the former being decided by the court, and the latter by triors. They are now universally tried by the courts, triors having been abolished by statute.<sup>4</sup>

The various grounds of challenge for cause apply equally in civil and criminal cases. It is a matter of right, and is co-existent with the jury system itself. The constitutional right of trial by jury implies that the trial shall be by an impartial jury, and upon that question the courts have spoken in no uncertain lan-

<sup>1</sup> *Stone v. Segur*, 93 Mass. 568; *Snodgrass v. Hunt*, 15 Ind. 274; *Bibb v. Reid*, 3 Ala. 88; *Schmidt v. Chicago, etc., R. R. Co.*, 83 Ill. 405.

<sup>2</sup> *Strote v. Hinchman*, 37 Mich. 490.

<sup>3</sup> *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285.

<sup>4</sup> “The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.” Sharswood’s Blackstone’s Com. III, 363.

guage. In *Diven v. City of Elmira*, 51 N. Y. 506, it was said: "The object of the law is to procure impartial, unbiased persons for jurors. They must be *omni exceptione majores*." The supreme court of Georgia, in *Nelson v. Dickson*, 63 Ga. 682, said: "An impartial jury is the corner-stone of the fairness of trial by jury;" and in *Ensign v. Harvey*, 15 Neb. 330, it was well said: "Unless fair-minded and unbiased jurors can be selected, a trial becomes a mere farce, dependent, not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice or interest of the jury."

**§ 268. Grounds of challenges for cause.**—The chief grounds of challenges for cause may be thus briefly stated:

1. Lack of the statutory qualifications of the juror, to which we have already referred. To this it may be added that a juror who does not understand the English language is disqualified from sitting in the case, although his rejection on that ground is largely within the discretion of the court.<sup>1</sup>

2. Interest in the result of the action disqualifies, but not an interest merely in the legal questions involved, without an interest in the result of the cause.<sup>2</sup> The various grounds of interest are these: (a) Pecuniary, in the result of the suit.<sup>3</sup> (b) Similar case

<sup>1</sup> *Sutton v. Fox*, 55 Wis. 531; *Fisher v. Philadelphia*, 4 Brewster (Pa.) 395; *McCormick v. State*, 9 Tex. App. 124; *Lyles v. State*, 41 Tex. 172; *Plank Road v. Railroad Co.*, 13 Ind. 99.

<sup>2</sup> *Wood v. Stoddard*, 2 Johns (N. Y.) 194; *Williams v. Smith*, 6 Cow. (N. Y.) 166.

<sup>3</sup> *Small v. Jones*, 6 Watts & Serg. (Pa.) 122; *Meeker v. Potter*, 5 N. J. Law 586; *Omaha v. Cane*, 15 Neb. 657.

pending.<sup>1</sup> (c) That the juror has wagered upon the result.<sup>2</sup> (d) Citizenship and tax-payer in a town or city party to the action. In many of the states this disqualification is removed by statute; but, in the absence of such a statute, it seems to be settled that the juror is disqualified if the action is against a municipality for damages, or for the direct recovery of money on any other ground, so that the judgment may affect his taxes.<sup>3</sup> (e) Membership, or stockholder, in a private corporation party to the cause.<sup>4</sup> (f) Membership in an association, one of the parties to the action, where the juror must contribute to the expenses of the suit.<sup>5</sup>

3. Relationship to either of the parties to the action. At common law, and now in some of the states, this is extended to the blood or kindred within the ninth degree.<sup>6</sup> In other states, persons are per-

<sup>1</sup> *Gardner v. Lanning*, 3 N. J. Law 231; *Lord v. Brown*, 5 Denio (N. Y.) 345; *Talmadge v. Northrup*, 1 Root (Conn.) 455.

<sup>2</sup> *Essex v. McPherson*, 64 Ill. 349; *Cheverius v. Com.*, 81 Va. 787; *Seaton v. Swem*, 58 Iowa 41.

<sup>3</sup> *Diven v. City of Elmira*, 51 N. Y. 506; *Goshen v. England*, 119 Ind. 368; *Gibson v. Wyandotte*, 20 Kan. 156; *Bailey v. Trumbull*, 31 Conn. 581; *Fulweiler v. St. Louis*, 61 Mo. 479; *Kendall v. City Albia*, 73 Iowa 243; *Mayor Columbus v. Goetchius*, 7 Ga. 139; *Hawes v. Gustin*, 2 Allen (Mass.) 404; *Wood v. Stoddard*, 2 Johns (N. Y.) 194; *State v. Williams*, 30 Me. 484.

<sup>4</sup> *Respublica v. Richards*, 1 Yeates 480; *Peninsula R. R. Co. v. Howard*, 20 Mich. 18; *Page v. Contocook Valley R. R. Co.*, 21 N. H. 438; *Fleeson v. Savage Mining Co.*, 3 Nev. 157.

<sup>5</sup> *Com. v. Moore*, 143 Mass. 136; *Cleage v. Hyden*, 6 Heisk. (Tenn.) 73.

<sup>6</sup> Sharswood's Blackstone's Com. III, 363; *Wireback v. First Nat. Bank*, 97 Pa. St. Rep. 543; *Jacques v. Com.*, 10 Gratt. (Va.) 690; *Morrison v. McKinnon*, 12 Fla. 552; *State v. Perry*, 6 Bush (N. Car.) 330. And Coke says: "How far remote soever he is of kindred, yet the challenge is good." Coke Litt., 157.

mitted to act as jurors though more closely related to the parties than would have permitted them to sit at common law.<sup>1</sup> Relationship by affinity disqualifies the juror at common law, and, under the statutes of most of the states, is also cause for challenge.<sup>2</sup> It has also been extended, by some decisions, to relationship to a party beneficially interested in the case; such as to a stockholder in a corporation party to the action; or to one interested in its result; and to counsel in the cause, whose fees depend upon recovery.<sup>3</sup>

#### 4. Dependence on a party to an action disquali-

<sup>1</sup> In Alabama, within the fifth degree; Code Ala., § 4186. In New York, Maine and Indiana, sixth degree; N. Y. Code Civ. Pro. § 1166; *Hardy v. Sproule*, 32 Me. 310; *High v. Big Creek Assn.*, 44 Ind. 356. In Vermont, California and Nebraska, fourth degree; *Churchill v. Churchill*, 12 Vt. 661; Cal. Pen. Code, § 1074; Cal. Civil Code, § 602; *Marion v. State*, 29 Neb. 233.

<sup>2</sup> *O'Conner v. State*, 9 Fla. 215; *Jacques v. Com.*, 10 Gratt. (Va.) 690; *Wireback v. First Nat. Bank*, 97 Pa. St. Rep. 543; *Dailey v. Gaines*, 1 Dana (Ky.) 529; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 331; *Dearmond v. Dearmond*, 10 Ind. 191; *Hartford Bank v. Hart*, 3 Day (Conn.) 491; *Woodbridge v. Raymond*, *Kirby* (Conn.) 280; *Den v. Clark*, 1 N. J. L. 446; *Trallinger v. Webb*, 3 Ind. 198; *Hardy v. Sproule*, 32 Me. 310; *Cain v. Ingham*, 7 Cow. (N. Y.) 478 and note; *State v. Shaw*, 3 Ired. (N. C.) 532; *Monson v. West*, 1 Leonard King's Bench 88; *Chase v. Jennings*, 38 Me. 44; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Carman v. Newall*, 1 Denio (N. Y.) 25; *Vannoy v. Gives*, 23 N. J. L. 201; *Bigelow v. Sprague*, 140 Mass. 425.

<sup>3</sup> *Georgia R. R. Co. v. Hart*, 60 Ga. 550; *Bank v. Leavens*, 20 Conn. 87; *Carew v. Howard*, 1 Root (Conn.) 323; *Bailey v. Trumbull*, 31 Conn. 581, 583 (*dicta*); *Day v. Savage*, Hobart King's Bench 85; *Woodbridge v. Raymond*, *Kirby* (Conn.) 280; *Hartford Bank v. Hart*, 3 Day (Conn.) 491; *Balsbaugh v. Fraser*, 19 Pa. St. Rep. 95; *Melson v. Dickson*, 63 Ga. 682; *Funk v. Ely*, 45 Pa. St. Rep. 444; *Pipher v. Lodge*, 16 Serg. & Rawle (Pa.) 214; *Wood v. Wood*, 52 N. H. 422; *State v. Jones*, 64 Mo. 391.

fies a juror; the test in this class of cases being whether the juror is subject to the control of the party. The various grounds of disqualifying dependence have been held to be: (a) That he is an employe or servant of one of the parties. (b) Or his partner in business. (c) Or his tenant. (d) Or surety for a party on an obligation, as indicating a strong bias; and, if relating to the claim in suit, on the additional ground of interest in the litigation. (e) Or if he receives favors from the party in a business way, and still expects them. (f) Or is a witness in the same case.<sup>1</sup>

5. Prior service of the juror, as such, upon a former trial of the same case is cause for challenge;<sup>2</sup> or if he has served as a juror upon the trial of a co-defendant;<sup>3</sup> or was one of the grand jury who found the indictment against the prisoner.<sup>4</sup> But,

<sup>1</sup> In the order given: (a) *Hubbard v. Rutledge*, 57 Miss. 7; *Central R. R. Co. v. Mitchell*, 63 Ga. 173; *Louisville R. R. Co. v. Mack*, 64 Miss. 738; *Hill v. Cochran*, 15 Colo. 270; *Gunter v. Graniteville Co.*, 18 S. C. 263; *State v. Coella*, 3 Wash. 99; *Block v. State*, 100 Ind. 357; (b) *Stum v. Hummel*, 39 Iowa 478; (c) *Hathaway v. Helmer*, 25 Barb. (N. Y.) 29; *Harrisburg Bank v. Foster*, 8 Watts (Pa.) 12; *Pipher v. Lodge*, 16 Serg. & Rawle (Pa.) 110; *contra*, *Brown v. Wheeler*, 18 Conn. 199; *Marsh v. Coppock*, 9 Car. & P. 480; (d) *Brazleton v. State*, 66 Ala. 96; *Anderson v. State*, 63 Ga. 675; *Bradshaw v. Hubbard*, 1 Gilm. (Ill.) 390; *Ferriday v. Selser*, 4 How. (Miss.) 506; (e) *Omaha R. R. Co. v. Cook*, (Neb.) 55 N. W. Rep. 943; (f) *Com. v. Joliffe*, 7 Watts (Pa.) 585.

<sup>2</sup> *Dunn v. State*, 7 Tex. App. 600; *Jacobs v. State*, 9 Tex. App. 278; *State v. Sheeley*, 15 Iowa 404; *Argent v. Darrell*, 2 Salk. K. B. 648.

<sup>3</sup> *Morton v. State*, 1 Kan. 468; *Arnold v. State*, 9 Tex. App. 435; 1 Inst. 157.

<sup>4</sup> *Greenwood v. State*, 34 Tex. 334; *Rex v. Cook*, 13 St. Tr. 334; *Rice v. State*, 16 Ind. 298; *State v. McDonald*, 9 W. Va. 456; *Bear-*

in the absence of a statute, it is not a ground for challenge that the jury in a prior case had found a verdict against the prisoner for another offense, or that the challenge is against one who had been a juror in a civil case involving the same general questions.<sup>1</sup>

**§ 269. Personal hostility or actual bias.**—Personal hostility to a party, or bias against him or his cause, form principal reasons of challenge for cause. This, because the right to unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury. If a constitution guarantees the right to a jury trial, it necessarily includes the guaranty that the trial shall be had before an impartial jury. According to the expressions in some cases, the juror should stand indifferent between the parties; in others, it is said that his mind should be as white paper. By reason of the dissemination of public information through the press, whereby knowledge of the facts of the more important causes is very generally made known, it is practically impossible to obtain jurors, worthy to sit in the trial of such cases, who are without some knowledge of the facts, and so it is, in these modern days, that the rule must be confined to the exclusion from the jury-box of those whose bias, or preconceived opinion, is sufficient to sway their judgment or influence their verdict against the evidence in the cause, or, as was said in Burr's trial : “ Those

son *v.* State, 34 Miss. 602; *State v. Gillick*, 7 Iowa 287; *Stewart v. State*, 15 Ohio St. 155.

<sup>1</sup> *United States v. Schackelford*, 3 Cranch, C. C. 178; *Com. v. Hill*, 4 Allen (Mass.) 591; *Plow Co. v. Deusch*, 16 Neb. 384; *Patterson v. State*, 48 N. J. L. 381.

strong and deep impressions which close the mind against the testimony which may be offered in opposition to them—which will combat that testimony, and resist its force.”

While the courts have universally declared that bias or prejudice excludes the juror, there is no authority defining the degree of bias necessary to found a challenge upon that ground. In a general way, the proper rule has been well stated in an able note to *Commonwealth v. Brown*, 9 Am. State Rep. 746: “Whenever a juror shows upon his examination that he himself fears that his deliberations can not be impartial, or where he expresses a state of feeling from which it appears that his mind is in an improper condition, he will generally be excluded.”

**§ 270. Grounds for exclusion of a juror for bias.**—The specific grounds upon which jurors have been excluded by reason of actual bias may thus be summarized :

1. Personal hostility towards one of the parties, or against some one beneficially interested in the action, even though it be general and without specific reference to the matter in controversy, will render the juror incompetent; and he is equally disqualified if it is shown that he has a bias in favor of one of the parties; but prejudice against a third party, or against one of the attorneys in the case, will not, as a rule, render the juror incompetent.<sup>1</sup>

<sup>1</sup> *Freeman v. People*, 4 Denio (N. Y.) 9; *Brittain v. Allen*, 2 Dev. (S. C.) 120; *Mima Queen v. Hepburn*, 7 Cranch 290; *Chess v. Chess*, 1 P. & W. (Pa.) 32; *Denver, etc., R. R. Co. v. Driscoll*, 12 Colo. 520; *Township v. Kirston*, 72 Mich. 1; *Jones v. State*, 55 Md. 350; *Pike Co. v. Griffin*, 15 Ga. 39; *Omaha v. Cane*, 15

2. A litigation pending between the juror and one of the parties was cause for challenge at common law, and would still be ground for exclusion if it appeared that there was the absence of that impartiality and freedom from prejudice requisite to qualify the juror for service.<sup>1</sup>

3. Prejudice or bias against the business in which a party is engaged, or against his nationality or creed, will disqualify the juror, unless it appear that he can lay aside his prejudice and render an impartial verdict, according to the law and the evidence.<sup>2</sup>

4. Prejudice against the class of cases or defenses which the juror is called to try, if it amounts to actual bias, will exclude the juror; certainly so if he appears to distrust his own ability to impartially try the case. But it must appear that the prejudice of the juror will influence his verdict, and, in a criminal case, if the bias is only such as a law-abiding citizen ought to have, it can not exclude him.<sup>3</sup>

Neb. 657; Hutchinson *v.* State, 10 Neb. 262; Strawn *v.* Cogswell, 28 Ill. 457; Catasaqua Mfg. Co. *v.* Hopkins, 141 Pa. St. Rep. 30; Mason *v.* State, 15 Tex. App. 534; Monaghan *v.* Ag'l Inst., 53 Mich. 238.

<sup>1</sup> Coke on Litt. 157; 1 Chitty Crim. Law. 541; People *v.* Bodine, 1 Denio (N. Y.) 281, 305; Davis *v.* Allen, 11 Pick. (Mass.) 466.

<sup>2</sup> *Business or occupation:* Lawlor *v.* Linforth, 72 Cal. 205; Winnesheik Ins. Co. *v.* Scheuller, 60 Ill. 465; United States *v.* Noelke, 1 Fed. Rep. 426; Meretzek *v.* Caldwell, 2 Abb. Pr. N. S. 407; Shields *v.* State, 95 Ind. 299; Albrecht *v.* Walker, 73 Ill. 69; State *v.* Nelson, 58 Iowa 208; Williams *v.* State, 3 Ga. 453. *Nationality:* Balbo *v.* People, 80 N. Y. 484. *Creed:* People *v.* Christy, 2 Abb. Pr. 256; People *v.* Reyes, 5 Cal. 347.

<sup>3</sup> People *v.* Carpenter, 102 N. Y. 238; Anson *v.* Dwight, 18 Iowa 241; Butler *v.* State, 97 Ind. 378; McCarthy *v.* Cass Ave., 92 Mo. 536; Spies *v.* People, 122 Ill. 1 (s. c. 123 U. S. 131); Winnesheik Ins. Co. *v.* Scheuller, 60 Ill. 465; People *v.* McGonegal, 136 N. Y. 62; Com. *v.* Poisson, 157 Mass. 510.

5. Prejudice against crime generally does not render the juror incompetent, in the absence of personal bias against the prisoner.<sup>1</sup>

6. Conscientious scruples against capital punishment, or against conviction on circumstantial evidence, disqualify the juror, unless he shows that he can act fairly and impartially and render a verdict irrespective of his scruples or convictions.<sup>2</sup>

**§ 271. Exclusion by reason of a formed or expressed opinion.**—That an opinion formed or expressed by a juror concerning the merits of the cause, or the guilt of the accused, will disqualify him, has been well settled, but there is much conflict in the authorities as to the degree of fixity of opinion touching the facts at issue, which will render him incompetent. In a general way, the rules governing the question may be thus stated.

1. If the opinion is based merely upon rumor or newspaper statements, and the juror testifies that he can give an impartial verdict from the evidence, he is generally admitted to the box.

2. But if the opinion has been formed through reports of the testimony, or from conversations with witnesses, it is held that the juror is disqualified.

<sup>1</sup> *Davis v. Hunter*, 7 Ala. 135; *State v. Burns*, 85 Mo. 47; *Kroer v. People*, 78 Ill. 294; *United States v. Borger*, 7 Fed. Rep. 193; *Williams v. State*, 3 Ga. 453; *Spies v. People*, 122 Ill. 1 (s. c. 123 U. S. 131).

<sup>2</sup> *Logan v. United States*, 144 U. S. 263; *O'Brien v. People*, 36 N. Y. 276; *People v. Fanshawe*, 137 N. Y. 68; *Fahnstock v. State*, 23 Ind. 231; *State v. Ward*, 39 Vt. 225; *Williams v. State*, 32 Miss. 389; *State v. Shields*, 33 La. Ann. 991. For a collection of the cases, and a full discussion of the authorities, see 3 *Wharton Crim. Law*, §§ 3116-3121.

3. The weight of authority—as well as the statute in many of the states—is now to the effect that if the juror testifies, to the satisfaction of the court, that he believes his previously formed opinion will have no effect, but will yield to the evidence, and that he can render an impartial verdict according to the law and evidence, he will be allowed to serve.<sup>1</sup>

4. But an opinion upon collateral, or merely incidental, questions involved does not disqualify, unless shown to be such as are likely to influence the verdict;<sup>2</sup> although an opinion that the defendant has already been sufficiently punished in a criminal prosecution will disqualify the juror in a civil action to recover damages for the same wrong.<sup>3</sup>

**§ 272. Trying challenges.**—As has been said, all challenges for cause are now tried by the court, the ancient practice of submitting the determination of challenges to the favor to triors having become obsolete, or abolished by statute. In most cases the trial court is entitled to a wide discretion, particularly in the control of the challenges, the manner of the examination of the jurors, and in excusing jurors.<sup>4</sup> Generally, the decision of the court, particularly in

<sup>1</sup> See statutes and authorities collated in 12 Am. and Eng. Encyc. Law 354, 355, and notes; 3 Wharton Criminal Law, §§ 3164-3110; 2 Elliott's General Practice, § 524, and notes.

<sup>2</sup> Weston *v.* Com., 111 Pa. St. Rep. 251; Hughes *v.* Cairo, 92 Ill. 339; Patterson *v.* State, 48 N. J. Law 381; Lowenburg *v.* People, 27 N. Y. 336; Elbin *v.* Wilson, 33 Md. 135; Dew *v.* McDevitt, 31 Ohio St. 139.

<sup>3</sup> Asbury Life Ins. Co. *v.* Warren, 66 Me. 523.

<sup>4</sup> State *v.* Linde, 54 Iowa 139; Rowell *v.* Boston and Maine R. R. Co., 58 N. H. 514; Thompson on Trials, § 88; 3 Wharton Crim. Law, §§ 3140, 3151; 12 Am. and Eng. Encyc. of Law, 359-361.

challenges to the favor, like the finding of the ancient triors, is conclusive as to the facts.<sup>1</sup>

To determine the competency of the juror he is examined upon his *voir dire*. Much latitude is permitted in this examination, leading questions being permitted, within the discretion of the court, and, in some cases, hypothetical questions have been allowed to be asked to ascertain how the juror would decide under a supposed state of the evidence; but the later decisions deny this right, particularly the recent case of *Chicago, etc., R. R. Co. v. Fisher*, 141 Ill. 614. The questions asked the juror, however, must be pertinent, fair and honest, and not such as tend to disgrace or degrade him.<sup>2</sup> While the usual mode of determining the competency is by his examination, other evidence may be given to prove the ground of challenge.<sup>3</sup>

Under the older practice, it was held that the challenge must be made as the juror comes to be sworn, and before the oath is begun, but now it is universally held that the challenge can be made at any time before he is sworn, and, in some courts, after the oath is taken, and before anything else is done. In other cases, both the peremptory challenges and those for cause have been subsequently permitted,

<sup>1</sup> *Stout v. People*, 4 Park Cr. (N. Y.) 132; *People v. Bodine*, 1 Denio (N. Y.) 281, 309; *United States v. McHenry*, 6 Blatchf. 503; *Patterson v. State*, 48 N. J. Law 381; *State v. Ihrig*, 106 Mo. 267; *State v. Green*, 95 N. C. 611; *Pickens v. Hobb*, 42 Ind. 270; *Lockhart v. State*, 92 Ind. 452.

<sup>2</sup> *Burt v. Panjaud*, 99 U. S. 180.

<sup>3</sup> *Burt v. Panjaud*, 99 U. S. 180; *People v. Mather*, 4 Wend. (N. Y.) 229.

but such a request is addressed only to the discretion of the court.

In order to make the proper record for an appeal, the grounds for the challenge should be specifically stated; the request, refusal and exception should appear, and, generally, the examination of the juror in full. When the action of the court is placed on record, and there is a regular issue and joinder, and judgment on this issue, then error lies at common law.<sup>1</sup>

**§ 273. When the right to challenge has been waived.**—Objections to jurors have been held to be waived in the following cases:

1. When the juror is accepted without examination as to his qualifications it is a waiver of all objections that might have been thereby discovered, unless the disqualification were unknown to the party and his counsel at the time of the trial; this exception, however, is not universally recognized.<sup>2</sup>

2. Knowledge, at the time of trial, of the incompetency of an accepted juror is a waiver of objections, and knowledge of counsel binds his client.<sup>3</sup>

3. A challenge to the polls is, generally, a waiver of challenge to the array; but an overruled challenge to the array, with the exception taken thereon,

<sup>1</sup>3 Wh. Crim. Law, §3152; *R. v. Edmonds*, 4 B. & Ald. 471.

<sup>2</sup>*Yanez v. State*, 6 Tex. App. 429; *Faville v. Shehan*, 68 Iowa 241; *Daniels v. City Lowell*, 139 Mass. 56; *Rollins v. Ames*, 2 N. H. 349 (S. C. 9 Am. Dec. 79, and note, where the cases are collected on both sides of the question).

<sup>3</sup>*State v. Tuller*, 34 Conn. 280; *Russel v. Quinn*, 114 Mass. 103; *Carmon v. Bullock*, 26 Ga. 431; *State v. Bowden*, 71 Me. 89; *Scott v. Moore*, 41 Vt. 205.

is not waived by afterwards challenging individual jurors.<sup>1</sup>

4. In an overruled challenge for cause an exception thereon is waived if the juror is afterwards challenged peremptorily, unless thereby the peremptory challenges are exhausted.<sup>2</sup>

5. An exception to an erroneous overruling of an objection or challenge is unavailing if the party does not exhaust his peremptory challenges.<sup>3</sup>

6. When a party waives a cause of challenge, existing only as against himself, the other party can not challenge upon the same ground.<sup>4</sup>

<sup>1</sup>Clinton *v.* Englebrecht, 13 Wall. 434; Watkins *v.* Weaver, 10 Johns. (N. Y.) 107; Mueller *v.* Rebhan, 94 Ill. 142; Co. Litt., 158 a.

<sup>2</sup>Burt *v.* Panjaud, 99 U. S. 180; Schoeffler *v.* State, 3 Wis. 823; People *v.* Aplin, 86 Mich. 393; State *v.* Brady, 107 N. C. 822; Wilson *v.* People, 94 Ill. 299; State *v.* Hoyt, 47 Conn. 518; Mimms *v.* State, 16 Ohio 221; Robinson *v.* Randall, 82 Ill. 521. *Contra*, Brown *v.* State, 70 Ind. 576; People *v.* Bodine, 1 Denio (N. Y.) 281.

<sup>3</sup>Robinson *v.* Randall, 82 Ill. 521; Sulings *v.* Shakespeare, 46 Mich. 408; State *v.* Elliott, 45 Iowa 486; St. Louis R. R. Co. *v.* Lux, 63 Ill. 523; State *v.* Jones, 97 N. C. 469; White *v.* State, 30 Tex App. 652.

<sup>4</sup>State *v.* Ketchey, 70 N. C. 621; Murphy *v.* State, 37 Ala. 142.

## CHAPTER XXVII.

### OPENING THE CASE TO THE JURY.

- § 274. The right to open and close.
- 275. The value of the opening address—First impressions.
- 276. Benefit gained by thus outlining the case.
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- 283. Exaggerations and overstatements to be avoided.
- 284. Secure the attention and interest of the jury.
- 285. The defendant's opening;
- 286. Motion to dismiss the case, or for verdict, on the opening.

§ 274. **The right to open and close.**—The value of both the opening and closing address to the jury is so apparent that it is always claimed by the side which feels itself entitled to that advantage. While in some of the states it is the practice for the plaintiff to open and close in all cases, this is not so in all jurisdictions. It is a general rule that the party upon whom rests the burden of proof is entitled to this right; a rule which has been thus stated: The party who would be defeated if no evidence were given on either side must first produce his evidence, and has the right to open and close. If the plaintiff has to give any evidence in order to be entitled to

the verdict for the amount claimed, the privilege is his, but it is the defendant's if he assumes the burden of proof by making an unqualified admission of all the material allegations of the declaration or complaint, and concedes all the facts the plaintiff would be obliged to prove to entitle him to recover his entire claim. This is an admission which the defendant should make with great care, as he may be without power to save the verdict by any evidence or argument he might produce.

Where there are several issues the plaintiff has the right to begin if he must give any proof under any one of them; and so, also, if there are several defendants, he has this privilege as against any one of them. Generally, error lies to a refusal to grant a party the right to open and close, but in a few cases it has been held to be a matter resting within the sound discretion of the court, subject only to review when it has been abused.<sup>1</sup>

**§ 275. The value of the opening address—First impressions.**—Two things, and both of great value, are to be gained by a good opening. First, the minds of the jury are as white sheets of paper, and he who first writes well and distinctly thereon, is likely to obtain the better result; because, from the manner in which his case is opened there will often follow an impulse and direction affecting the cause during the whole trial. The jury will listen with attention to an opening address, as the case is new to

<sup>1</sup> For a discussion of the whole subject of the right to open and close, see 2 Elliott's General Practice, Chapter xx; also, Abbott's Trial Brief, pp. 30-39, and an article in 25 Central Law Journal 171, on the "Right to Begin and Reply."

them, and are likely to obtain a favorable impression of its merits if they are properly presented. First impressions are always lasting, and with the average juror are often controlling elements. As has been wisely said: "Generally speaking, a case well opened is half won. It is the opening speech that gives the cue to the jury. Throughout the course of the evidence they follow the lines there given them."

**§ 276. Benefit gained by thus outlining the case.—** The second advantage of the opening address to the jury, gained at the outset of the case, is that, if it is then thoroughly explained to them, they will be better enabled to comprehend the force and effect of the testimony when it is introduced, and, as sometimes it must be presented somewhat disjointedly, will more easily be able to fit it into its proper place in the construction of the case, and to note the bearing one part has upon the other. If one were to pass upon the merits of the construction of a building, and to note the manner in which it is erected, while in progress, he would be much assisted if, before it was begun, the plans and specifications were explained and he knew what was to be built, and how it was to be done. So, with a law suit, the jury must be told that which is to be proven so clearly that they are able to understand and apply the evidence when it is presented to them by the witnesses.

**§ 277. The English practice as to the opening.—** At the English bar it is customary to make a much more extended opening of the case than is usual with the American advocate. With us it is a duty very frequently delegated to the junior associate, who has not been sufficiently impressed with the value of the

address, and who often fails in that which should command his best powers. This is not the practice of the English lawyers, for with them the duty is looked upon as one requiring the exercise of the strongest powers of the advocate and, in important cases, is assumed by the senior counsel.

**§ 278. The opening addresses in the Tichborne case.**—In the great Tichborne case, one of the most famous trials in history, Mr. Hawkins, the leading counsel for the crown, occupied six full days in delivering his opening speech, while Dr. Kenealy, who led for the defense, consumed twenty-one days in his opening to the jury. A writer who has ably described that *cause célèbre* said of this speech: “The case for the prosecution being closed, Dr. Kenealy, on the twenty-second day of July (1873) arose to open the case for the defendant. He obtained leave to remove his wig on account of the excessive heat, and forthwith plunged into an harangue which was in many respects so extraordinary as to show that this precaution for keeping his head cool had been neither superfluous nor altogether effectual. \* \* \*

During the long speech of the worthy and facile Doctor, his auditors were not always able to control their impatience. The jury were often provoked into expostulations at his usurpation of their time, and even the better trained members of the bench could not always restrain the expression of their similar feelings. Mr. Justice Mellor one day told the counsel that ‘Life was not long enough for such a trial,’ and on another occasion, in picturesque metaphor, he begged the gentleman to use a shovel instead of a teaspoon. When, at length, Dr. Kenealy

sat down at the close of his address, and it was found that he had really finished it, and that the strong hours had at last conquered even him, he was greeted with rounds of applause; whether in recognition of the excellence of his achievement or in gratitude that he had brought it to an end, does not fully appear.”<sup>1</sup>

**§ 279. Of what the opening should consist.**—The object of the opening is to briefly state the nature of the action, the substance of the pleadings, the points at issue, and an outline of the evidence which the counsel is about to introduce. The chief aim should be to make a clear statement of the facts to be proven in the case. To that end it is at once apparent that the advocate must have his evidence well in hand, and that he has become its master in outline as well as in detail. It is well to begin with an account of the parties, who and what they are, and the circumstances under which the case arose, followed, with some precision, by a statement of the nature of the dispute itself, and of the questions at issue. Then comes a narrative of the facts which are to be presented: these should be given chronologically, that is in the order of time in which they occurred. In short, a proper opening is a history of the case, told as should be a story, with such system and in such an order that it can readily be grasped and understood by the jury.

**§ 280. Mr. Justice Miller's suggestions as to the opening address.**—That eminent jurist, the late Mr. Justice Miller, of the Supreme Court of the United States, in describing the opening address, whether to the court or to the jury, well said :

<sup>1</sup> Morse's Famous Trials, pp. 5, 234.

“The counsel whose duty it is to make the opening statement for his side of the case should have a clear theory of that case, and a theory around which he should group all the facts which he admits as established for the other side, and those which he intends to rely on as proved by his own. And while he need not in terms state what that theory is, his statement of the case should conform to it strictly; should suggest it to the mind of the court or jury, with such a distinct perception of it that the legal propositions appropriate to the counsel’s view of the case seem naturally to arise out of the statement.

“To enable the judge or jury to understand fully, and appreciate correctly, the force and value of the more elaborate argument, it is necessary, in the first instance, to give a clear view of the aspect of the case, of the matter to be decided, and of the elements of which that decision must be composed. The object is not successfully attained either by the announcement that certain abstract questions of law are necessary to be decided in the judgment to be rendered, nor that certain items of evidence will be introduced. \* \* \*

“The propositions of law and fact on which counsel rely must be stated so as to show clearly their relation to each other, and be so plainly expressed as to present a chart of the road to be traveled, without a map in detail of the country through which that road is to go.”<sup>1</sup>

§ 281. **Mr. Cox’s advice.**—No book so well describes the proper opening of a cause and treats it so

<sup>1</sup> Rhetoric as an Art of Persuasion, pp. 39, 40.

much in detail as that of Mr. Cox in his work entitled "The Advocate ; his Training, Practice, Rights and Duties."<sup>1</sup> The great point which he impresses upon the advocate is the duty of conveying to the jury a clear idea of what the case is, and of that which will be proven by the witnesses. We take the liberty to quote some of the suggestions he offers on the subject :

"Strange as it may appear, there is nothing more difficult in the art of advocacy than effectively to open a case to a jury. The proof of this is the rarity of the exhibition. How few of our advocates accomplish it to the entire satisfaction of a critical listener. How few possess the faculty of marshalling facts in their natural order, and taking up and so interweaving distinct threads of a story as to form a clear, continuous, intelligible narrative. Even if he can thus arrange his facts, there is seldom found in the same person the faculty of describing them graphically, so as to paint them upon the minds of those to whom they are addressed. Yet, unless thus presented glowing with color, substantial in form and instinct with life, no clear image, whether of places or events, is summoned to the mind's eye of a listener; at the best, he obtains but a confused, shadowy, uncertain conception of the scene you desire to convey to him. \* \* \*

"Remember what is your purpose. It is your object to convey to the jury and to the court a history of your case, so that they may thoroughly understand what is the subject-matter of the contention,

<sup>1</sup> Quoted at length in Hardwicke's Art of Winning Cases, pp. 51-76.

upon what grounds of claim or complaint you come into court, and the evidence by which you propose to establish them. Now, to make any narrative clearly intelligible, the first care is to observe, as closely as possible, the order of time in detailing the events. You will commence, of course, with a description of the parties, who and what they are, with the addition of any circumstances in the position of either of them which may affect the case by explaining subsequent transactions, or aggravating the damages. If locality is in any way concerned, describe the *locus in quo*, and, if possible, in all cases use a map for this purpose. The rudest drawing of a place is more intelligible than any verbal description; and it has the still more important use of at once arousing, and fixing upon the story, the attention of the jury."

§ 282. **Mr. Cox's advice continued.**—"Having described the persons and the place, take up your narrative at such period preceding the immediate matter of controversy as may be necessary to explain the cause of it,—to use a legal phrase, begin with the inducement. Show how it was that the conflict arose. Then describe minutely, with careful reference to the plan, if there be one, the subject-matter of the dispute, and the precise questions which the jury will have to determine in relation to it. This done, you will proceed to state your case, the facts and arguments upon which you rest your claim to the verdict. Advocates do not always make this statement in this part of their opening. Often they reserve it for the close, preferring first to state their evidence. But, consulting, as before suggested, one's

own mind for the manner in which conviction is most readily produced, it appears that, to make the account of all the evidence easily intelligible, it is necessary to have such a previous view of the facts as might enable us to discern the bearings of the promised testimony. We would, therefore, earnestly recommend to you to adopt, as an invariable rule of your practice, the plan of preceding your statement of the evidence with a succinct narrative of the facts and the arguments you found upon them, briefly set forth, and then to proceed to describe the testimony by which, as you are instructed, you will establish those facts.

"In concluding your opening, it is rarely prudent to do more than briefly repeat the outline of your case, and especially so much of it as goes to aggravate damages, winding up by a calm assertion of your confidence that, if you establish the case you have stated, you will be entitled to their verdict. Anything in the shape of a formal peroration, and especially any display of eloquence at the close of an opening, is out of place and in bad taste, and only permissible in a few exceptional cases, of which it must be left to your discretion at the moment to determine."

**§ 283. Exaggerations and overstatements to be avoided.**—No portion of the trial of a cause more demands absolute truthfulness than the opening address to the jury, and for this reason any overstatements or exaggerations of the facts must be avoided. If the proof, as adduced at the trial, falls short of the statements made by counsel it reacts upon the case itself, and creates a distrust in what-

ever else the advocate has claimed for it. Jurors are apt to resent any apparent intent to deceive them, and are liable to become prejudiced against the side which has misled them. In addition, the opposing counsel will be quick to notice any statement in the opening address which exceeds the proof offered, and is likely to severely comment upon it in his argument. On the contrary, where the testimony is stronger than it was stated by the advocate to be, he secures credit for his modesty and candor, which are great virtues in the eyes of the jurors. Therefore, it should be the attempt of the counsel for the plaintiff, in opening his case, to make such a truthful statement of the facts which he proposes to prove that he will win the confidence of the jury and impress them with his own fairness and with the desire to honestly try his cause.

**§ 284. Secure the attention and interest of the jury.**—The advocate needs to arouse the attention of the jury and to secure their interest in the case which they are to try. There is no better way to insure this than by his manifestation of earnestness and of a thorough belief in the justice of his cause. If the advocate does not show that he, himself, is imbued with the right of his client to recover he can not expect to win the sympathy of others, or to be sure that they will feel that interest in his cause which assures their favorable decision. A half-hearted lawyer who opens his case without any seeming care for its result is likely to fail of success, for he can not expect the jury to give much attention to evidence he does not seem to consider as of value or of interest.

The term advocate means one who pleads another's cause, and he who does not show that he is at heart the advocate of his client's case can not expect to win the verdict. The enthusiasm that an able and earnest lawyer throws into his case reacts upon his listeners, and will assist, in no small degree, in bringing them into the cause as his associates; because when the jury has become convinced of the justice of the client's case, as they will be by being made enthusiastic in its behalf, they are won to its favorable decision.

Except in very rare instances, forensic oratory is out of place in the opening of a case, but it is not improper for the lawyer to present his cause to the jury in such a spirited way as to show that he is the advocate of his client's cause, and firmly believes in its justice and in his right to the verdict.

§ 285. **The defendant's opening.**—Nearly all that has been said in the preceding sections will apply with equal force to the opening address of the counsel for the defendant. He need not be so elaborate as was the plaintiff's attorney, for the jury have learned a good deal about the case, and, probably, something of the defense. They will, however, listen to him very attentively, as they are curious to know how he proposes to answer the plaintiff's proofs and positions. It is this very curiosity which gives him an advantage he should not be slow to take. As before said, it is of great value to secure the attention of the jury, and of this the defendant's counsel is sure, because they desire to know what he has to say and what will be the line of his defense. Therefore, it is his part to state that which he pro-

poses to prove so clearly and distinctly, and with regard to such an order and arrangement of the facts, that the jury will be able to understand his defense and to properly apply the evidence to the case.

As an eminent jurist has said : “The case should be opened leaf by leaf as a rose unfolds,” and no one has so good an opportunity to do this as the advocate who represents the defendant, as he is always sure of attentive listeners. Indeed, it is useful to note the stillness which always falls over the court-room when the defendant’s case is being opened. The court, the jury, and opposing counsel, as well as the general audience, are sure to give their attention, if for no other reason than that of curiosity to learn what the defense is to be, and as this is the advocate’s opportunity he should not fail to grasp it. He, of course, will not be permitted to argue his case, but he can make such a presentation of the lines of proof he proposes to follow as will have much weight with the jury, and materially assist his cause.

**§ 286. Motion to dismiss the case, or for verdict on the opening.**—If, in the opening, the plaintiff’s counsel puts his cause upon a ground which is clearly untenable in point of law, the court may direct the proceedings to be dismissed without hearing the evidence, upon such a motion by the defendant ; or, if the defendant’s counsel in his opening makes such admissions as would justify a verdict for the plaintiff, it may be so ordered upon motion. The reason is that the court ought not to spend time in

hearing evidence of facts which will not sustain an action or show a legal defense.<sup>1</sup>

<sup>1</sup> *Oscanyan v. Arms Co.*, 103 U. S. 261; *Clews v. Bank*, 105 N. Y. 398; *Crisup v. Grosslight*, 79 Mich. 380. *Contra*, *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322.

## CHAPTER XXVIII.

### THE EXAMINATION-IN-CHIEF.

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§ 287. **The order of proof.**—The rules of law governing the order of proof may be thus stated. The party who has the opening should produce all the evidence necessary to make out his side of the issue, but need not then introduce that which merely serves to answer his adversary's case. He must make at least a *prima facie* case in all respects, but is not compelled to offer evidence at first in denial of the affirmative defense of the defendant. This done,

the other side, usually the defendant, introduces the proofs in denial of the evidence or *prima facie* case of the party opening, as well as in support of his own defense, or cause of action, as the case may be. Then follows the evidence in rebuttal, which is generally confined to answering the proofs adduced by the adversary, and without proving that which properly belonged to the case in chief. However, the court has the discretion to permit a departure from this usual rule by allowing in rebuttal that which could have been shown in the opening; this, because the order of the proof is largely within the control of the court.<sup>1</sup> Where the rebuttal evidence raises new and distinct facts, the opposite party is entitled to introduce proper evidence tending to meet and disprove it, and this is called sur-rebuttal.

**§ 288. The orderly arrangement of the evidence.**

—In presenting the evidence to the jury two objects are to be obtained: one to impress the case upon the minds of the jurors, and the other to fix the facts firmly in their memory. To properly marshal the testimony so that it may have this effect is an art in which one grows more efficient by practice. The first element required is that counsel should thoroughly know the evidence, and then that he will so arrange it that it is given under a logical and orderly system. Although every lawyer knows the importance of this course, yet, in practice, it is left too much to accident and chance, and witnesses are called to the stand without reference to the association of events, but, rather, as their convenience or the whim of counsel or the client may suggest.

<sup>1</sup> 2 Elliott's General Practice, § 572, note 1; § 573, note 2.

The true plan is to distribute the testimony into groups of facts in accordance with their natural and logical relation to one another. This arrangement will appear to a reasonable mind to have been the usual order in which the events occurred, and, when they are followed by the attendant circumstances belonging with them, the evidence will be presented in a convincing form. Facts appear the strongest when told in their chronological order, moving them forward from cause to effect, from what occurred at one time to that which immediately succeeded. The jury are ignorant of the dispute and desire to become familiar with it, and this knowledge they can best secure when the facts are narrated to them in a natural order ; like, when a story is well told, the sequence of its events, narrated in the order of their occurrence, makes it clear and easily to be comprehended.

Too often the advocate will assume that the jury know facts which have not been proven, and may thus omit some evidence of importance, if not controlling in the case ; but, more frequently, his fault lies in presenting his evidence in such a confused order that it fails to make that impression upon the minds of the jury which is necessary to show the strength of the cause. The facts of a case can be likened to the soldiers of an army. Individually, they can do but little, but when assembled in groups or companies, and brought forward under some definite plan and generalship, they are effective. Each group of facts takes its place in the general formation, and together they form the compact army that marches to victory

§ 289. **The order of the witnesses.**—It is advisable to arrange the witnesses in the groups of the different subjects to which they are to testify, and to call them in that order, so as to prevent the attention of the jury from being diverted from the same subject-matter by the introduction of other portions of the case not properly related to the subject. Where witnesses follow each other in unbroken succession, all testifying to the same matter, the cause is well presented and with much greater strength than if the attack should be made disjointedly, and subjects intermingled which have no connection with each other. Thus, in an action for damages for personal injuries, the witnesses who are to testify to the act which caused the injury should be called successively, and without interjecting the evidence of those who are to prove the amount of the damages. In short, one subject or portion of the case should be concluded before the other is taken up, if the evidence can be so arranged.

§ 290. **Examine the best witness first.**—In examining a class of witnesses he should first be brought forward who is the strongest and, therefore, the best witness. This evidence strengthens the weak-kneed ones who follow, and draws the fire of cross-examination, usually the hottest against the first witness, and, if he is the most invincible, the best able to withstand that contest. In addition, as we have already said, first impressions being the best they should be furnished by the witness most likely to create them, for the influence in favor of a cause first made with the jury is the most difficult to eradicate by the adversary.

It is better that the first witness to be called should be the client, even if his testimony is brief and unimportant. If he is of prepossessing appearance he materially assists his cause, for the reason that the jury thus make his acquaintance at the outset, and are likely to enlist their sympathies in his behalf, and, thereby be predisposed to listen to whatever may support or illustrate his claim. If it is thought that the client will prove to be a poor witness, and will fail to elicit the favor of the jury, another should be chosen in his place, and his testimony, if it is required, introduced later.

It is often wise to save one of the best witnesses for the close of the case, or at least at the conclusion of each group of facts. Thus the case may acquire additional strength with the jury, and their first impressions, gained from the strong witness at the commencement, confirmed by similar testimony given at the end of the case.

**291. The advocate's manner in examining the witnesses.**—The advocate who properly examines a witness will be cool and self-possessed, and will convey to his witness a confidence in himself, and show him that he is strong enough to help him out of his difficulties. If the advocate evinces alarm or nervousness he is apt to communicate the same feelings to his witnesses and will thus injuriously affect their testimony. Again, the lawyer must ask his questions in a natural and unaffected manner, without the use of set phrases or high sounding words. This naturalness, and the use of plain and simple language in framing the questions, secure intelligent answers, and are much more effective than any display of

affectation. On the other hand, anything approaching familiarity or flippancy is most unwise, as it tends to confuse the witness, and to make him appear as foolish as does the examiner. The questions should be propounded without haste and made intelligible to the witness; he should be given time to answer, and when he has stated an important fact it is best to pause a moment before proceeding to the next question, in order that what he has said may have its full effect with the jury.

It is essential that the lawyer should have a definite aim and purpose in examining witnesses, and if he have a line of inquiry it should be followed out without being diverted by side issues. At all times the advocate must be courteous and gentlemanly with his witnesses, and avoid all indications of annoyance or vexation.

**§ 292. The proper method of conducting an examination-in-chief.**—The first questions to be asked the witness are of an introductory nature, such as of his residence, occupation, acquaintance with the parties, etc. This somewhat relieves him from his embarrassment, and affords him an opportunity to collect his thoughts. This done, the attention of the witness is to be directed to the main facts upon which he is to testify, by so framing the questions that he will relate the events in the order of their occurrence, and from their beginning, with the accompanying conversations, if important and advisable, and their minor incidents, if material. As far as possible let him tell his story in his own way, interrupting him as little as possible, and asking him no unnecessary questions, but watching him closely

to prevent him from straying into extraneous matters or hearsay evidence. A question such as "What took place next?" or the interrogative "Yes?" may often assist him when he seems to falter or lose his way, but he should not be confused by questions leading him away from the line of his story, or another subject begun until he has finished that which he has commenced.

**§ 293. Avoid leading questions.**—It is important that the facts should come from the witness, and, therefore, it is improper for the examiner to put the words into his mouth by questions which produce only an affirmative or negative answer. The evidence is much stronger if it comes from the witness, and the questions should be so framed that they will have this effect. One of the chief difficulties of the beginner, as well as of the more experienced practitioner, is to avoid leading questions. While they are permitted in matters merely introductory or preliminary, and, sometimes, within the discretion of the court, where the memory of the witness seems defective and the case is complicated, or he is apparently hostile, or it is necessary to identify persons and things, as a rule they must be avoided. The art consists in so framing the question as to draw out the answer without violating this rule of evidence. By changing the form of the question the hint may properly be conveyed to the witness, or by asking him to repeat what he has said respecting a particular part of the transaction the desired answer may be secured. If, however, the witness is too dull or stupid to give the facts, and it is impossible to draw them from him, it is better to leave him alone.

§ 294. **Avoid over-examination.**—When a clear and intelligent answer has been secured from a witness it is wiser to stand by it and pass on to something else, rather than to run the risk of a weaker answer to a repetition of the question. Again, the witness by being interrogated the second time may fear that his first answer was incorrect, and thus may become confused, or may so change the form of his words as to produce a discrepancy in his evidence.

This over-examination is a serious but common fault; but little is ever gained by it, and much is often lost. Here is an excellent example of the danger of cross-examining one's own witness, given by Mr. Harris: “Before Mr. Justice Hawkins, not long since, a junior was conducting a case which seemed pretty clear upon the bare statement of the prosecutor. But he was asked: ‘Are you sure of so and so?’ ‘Yes’ said the witness. ‘Quite?’ inquired the counsel. ‘Quite,’ said the witness. ‘You have no doubt?’ persisted the counsel. ‘Well,’ answered the witness, ‘I haven’t much doubt, because I asked my wife.’ Mr. Justice Hawkins: ‘You asked your wife in order to be sure in your own mind?’ ‘Quite so, my lord.’ ‘Then you had some doubt before?’ ‘Well, I may have had a little, my lord.’ ”<sup>1</sup>

The exception to this rule against the repetition of the statement of the witness is when it is advisable to fix a date, an amount, the specific terms of an agreement, or the like. Here, it may be wise to repeat the question, and if it is a matter of positive

<sup>1</sup> Hints on Advocacy, p. 32, 33.

knowledge with the witness it is well to bring out his testimony clearly and distinctly upon those subjects.

**§ 295. David Paul Brown's Golden Rules for the examination of witnesses.**—That famous trial lawyer, the late David Paul Brown, well said: “There is often more eloquence, more mind, more knowledge of human nature displayed in the examination of a witness than in the discussion of the cause to which his testimony relates. Evidence without argument is worth much more than argument without evidence. In their union they are irresistible.”

He has given the profession eleven rules for the examination-in-chief of witnesses which are of great benefit to the advocate, and, particularly to the beginner, although, like all such rules, they are merely suggestions and can not always be followed, and are not without exceptions. He sets them forth under the title of “Golden Rules for the Examination of Witnesses.”<sup>1</sup>

“*First.* If your own witnesses are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance.

“*Second.* If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as, for instance: Where do you live? Do you know the parties? How long have you known them? and the like. When you have re-

<sup>1</sup> 1 Forum, LXXIV.

stored them to composure, and the mind has regained its equilibrium, proceed to the most essential features of the cause, being careful to be mild and distinct in your approaches, lest you may trouble the fountain again from which you are to drink.

“*Third.* If the evidence of your own witnesses be unfavorable to you—which should always be carefully guarded against—exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

“*Fourth.* If you see that the mind of the witness is imbued with prejudices against your client, hope but little from such a quarter—unless there be some facts which are essential to your client’s protection, and which that witness alone can prove; either do not call him, or get rid of him as soon as possible. If the opposite counsel perceive that bias to which I have referred, he may employ it to your own ruin. In judicial inquiries, of all possible evils, the worst, and the hardest to resist, is an enemy in the disguise of a friend. You can not impeach him—you can not disarm him—you can not indirectly even assail him; and if you exercise the only privilege that is left to you, and call other witnesses for the purpose of an explanation, you must bear in mind that instead of carrying the war into the enemy’s country, the struggle is between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this, by all means.

“*Fifth.* Never call a witness whom your adversary will be compelled to call. This will afford you the

privilege of cross-examination, take from your opponent the small privilege it thus gives you, and, in addition thereto, not only render everything unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony.

“*Sixth.* Never ask a question without an object—nor without being able to connect that object with the case, if objected to as irrelevant.

“*Seventh.* Be careful not to put your question in such form that, if opposed for informality, you can not sustain it, or at the least produce strong reasons in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

“*Eighth.* Never object to a question put by your adversary, without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it indicates either a want of correct perception in making them, or a deficiency of reason, or of moral courage, in not making them good.

“*Ninth.* Speak to your witness clearly and distinctly, as if you were awake, and engaged in a matter of interest; and make him, also, speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be, whether the counsel or the witness shall first go to sleep?

“*Tenth.* Modulate your voice as circumstances may direct. ‘Inspire the fearful, and repress the bold.’

*“Eleventh.* Never begin before you are ready, and always finish when you have done. In other words, do not question for question’s sake—but for an answer.”

**§ 296. The examination of special or peculiar witnesses—The expert.**—“Many men of many minds, many *witnesses* of many kinds,” may slightly change the old couplet, but none the less will mark the differences which will be found in those who are called to testify in a cause. In another chapter, and in connection with the subject of cross-examination, still further classes of witnesses are described, our reference here being to those particularly to be considered in connection with the subject of the direct examination.

Expert witnesses are often required in matters pertaining to science, skill, trade, etc.; the foundation for their competency being first shown by preliminary questions as to their skill, knowledge and experience in the special subject concerning which their opinion is desired. Here, the advocate stands between such a witness and the jury as an interpreter into plain language of their skilled or scientific evidence. He needs to himself understand the matters concerning which such experts are to testify, not only to be able to bring them within the comprehension of the jury, but, also, that he may be able to properly question the witness. This knowledge should form a part of his thorough preparation of the cause, although, at trial, he may be assisted by questions suggested to him by others also expert in the subject-matter of the inquiry. These questions must not only be so framed as to draw out the skilled knowledge of his

witness, but, equally, that the jury may comprehend both the question and the answer.

§ 297. **The timid and inexperienced witness.**—The timid and inexperienced witness must be handled with tact and shrewdness. The lawyer must assist the witness in overcoming this timidity in order that he may be able to properly give his testimony, which, otherwise, might be of but little value, if not positively injurious. Therefore, he should be coaxed and gently led, and put at his ease by courteous and easy questions as to his residence, occupation, acquaintance with the parties, and other simple inquiries. This done, his mental powers may be relied upon for more important matters; the questions being put in a simple and direct manner and limited to one point at a time, commencing with those most readily understood, and leading to those more important and difficult. If his discomposure returns the important subjects should be temporarily abandoned, and the witness occupied with minor questions until his equanimity has been restored. Above all, no impatience or vexation should be manifested toward such a witness, as such a course is sure to throw him entirely off his base. Suavity and gentleness with such an one will win much more from him than will scowls and impertinent comments upon his embarrassment.

§ 298. **The bold and confident witness.**—The bold and over-confident witness creates almost equal difficulties. The danger is that he is apt to prove too much by overstatements and exaggerations, not only raising serious doubts as to his truthfulness, but making him an easy victim at the cross-examination. Such

a witness must be suppressed and not permitted to take the bit into his teeth and run away with the case. Counsel must be firm in such instances, by requiring his witness to answer the questions as they are put, and not to stray away from them. He should be so interrogated that his answers are as short and simple as possible, and his replies cut off by a new question the instant the true answer to the preceding one has been given. Mr. Ram gives this advice concerning such witnesses: “To check them at the outset by kindly, but gravely and peremptorily requiring them to do no more than simply answer the questions you may put to them, and then to so frame your questions that their answer shall be a plain ‘yes,’ or ‘no,’ giving them no opportunity for expatiating.”<sup>1</sup>

**§ 299. Witnesses whose testimony fails from the preliminary examination.**—In the examination of witnesses it is frequently found that through confusion, forgetfulness, and, sometimes, treachery, their testimony does not come up to that previously given by them at the preliminary examination, and as contained in the notes of preparation. Here, again, tact and skill are to be shown; a fair attempt must be made to draw out the witness, still, if unsuccessful, indignation or surprise should not be exhibited, but the matter should be treated as of no particular consequence, and some other subject taken up. Where the evidence sought to be obtained is of vital importance, and it is apparent that the witness is antagonistic to the client or his cause, and no con-

<sup>1</sup> Ram on Facts, Appendix, 326.

ciliatory measures are successful, a sharper line of examination should be followed for the purpose of showing his hostility or adverse interest. If, fortunately, there was secured at the preliminary examination a signed statement from the witness, he can now be confronted with it, and his treachery made apparent. But it is always unfortunate to be compelled to quarrel with one's own witness, as it may injure the cause with the jury, and the best thing to do, ordinarily, is to be rid of him as soon as possible.

**§ 300. The dull and stupid witness.**—No witnesses so much require from the advocate the exercise of patience and equanimity as those who are dull and stupid, or wander away from the point at issue. The difficulty lies in obtaining intelligent answers, and in preventing them from straying into extraneous matters. They are usually honest and desire to aid the cause in which they are called, but fail in making themselves clear and intelligible. The advocate must make his questions understood by such witnesses by putting them in language to which they are accustomed, even if it is ungrammatical, and words are mispronounced. These questions are to be short, direct, given deliberately and calling for the expression of but a single thought, and should lead the witness through his testimony step by step. If one question fails to secure his attention to a given subject he must be asked another, approaching the subject from different sides, until the comprehension of the witness is secured.

**§ 301. Notes of the evidence.**—It is well to use blank books for the notes taken at the trial or ar-

gument of cases, for when these are indexed and preserved they will be found of assistance both in matters connected with the same case, like new trials, etc., and as helps to other cases when some of the same questions may be raised.

When the trial begins it is well to set down in the note book the name of the case, that of the trial judge and of opposing counsel, as well as of the date when the cause is tried. The notes of the trial itself should be taken as fully as possible, but the attention of the advocate must not be so confined to them as to prevent his giving full attention to the witness. It may be a labor delegated to a junior, or to a clerk, who are thus of much assistance when the advocate feels the importance of giving his whole mind to the testimony and to the manner of the witnesses. For the party conducting the direct examination it is not of so much importance, as his preparatory notes may sufficiently cover the ground. Still, it is well to note the names of the witnesses and short memoranda of the essential points of their evidence, particularly as regards important expressions, which should be given in the exact words of the witness, dates, amounts, etc.

For the cross-examiner more complete notes are required, so that he may be able to properly examine his opponent's witnesses. Yet, as we shall see later, he ought to keep his eye on the witness and can not afford to be confined to his note-book. In the absence of an assistant he must make such notes as concern the essential facts of the evidence, leaving space to add then, or later, his own observations or

suggestions needed either in the cross-examination or at argument. Some men are so gifted in memory that they do not need to take any notes, but as that is not the fortune of all advocates they must rely somewhat upon their memoranda, in order that the more important facts of the testimony do not escape them, either when cross-examining, or in argument, and, particularly, when they come to produce their testimony in answer to the evidence of the adversary.

**§ 302. Offers of evidence and objections.**—For the purpose of introducing objections, as well as to enable the court to determine the admissibility of the evidence, and to properly present the case on appeal, the usual practice is to require an offer of evidence, or statement of what is proposed to be proved by a witness, or otherwise. This offer may be so framed that while the testimony of the witness on the stand might not, of itself, be relevant, it can be made so by the statement that other evidence will be given later to properly bring in the present testimony. A failure to follow with such proof can be met by a motion to strike out the evidence earlier admitted on the faith of the offer.

When the offer of evidence is in, the objections can be made, which should be specifically stated, and counsel prepared to defend them by authorities. Frivolous and unnecessary objections should always be avoided, as they tend to weaken the case by leading the jury to believe that the cause of the objector is a weak one, and that he is seeking to bolster it up with purely technical objections, and is afraid to have the merits of the case brought before them.

Sometimes the objections can be prepared before hand, as the counsel may know the questions which will be raised by the opponent, and will have previous opportunity to write them out. But this is only occasionally his good fortune, and he will often be obliged to frame his objections while at trial, and without any opportunity to think them out. Here will be a test of his skill, as it will be labor commanding his best talent, and requiring a mental exercise of no mean order. If he have the cardinal rules of evidence thoroughly in mind, and at his fingers' ends, he will be much assisted, while, without them, he can hardly hope to be successful.

When the court has made a ruling upon an objection, the party to whom it is adverse should then secure a proper exception, in order to present the question on appeal. For this purpose, the record should show the offer or question, the objection and its specific grounds, the ruling and the exception.

It is not always wise to demand an offer of evidence, and if the objections can be as well taken in any other way it is best to avoid this statement, because if it is in the presence of the jury—although the court may order it to be made out of their hearing—it may be believed by them, even if excluded by the court. There are lawyers, although they do not deserve the name of honorable advocates, who will make this statement in a very impressive manner, although they know the offer will be excluded by the court, for the purpose of improperly influencing the jury. Such men should not be given the opportunity to obtain this unfair advantage, if it can be avoided.

## CHAPTER XXIX.

### CROSS-EXAMINATION.

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- 319. Treat the honest witness with fairness.
- 320. The wisdom of knowing when to stop.
- 321. David Paul Brown's rules for cross-examination.

§ 303. **The difficulties in cross-examining witnesses.**—Proper cross-examination is one of the skilled arts in the profession of law, and forms one of the most difficult of the lawyer's duties. It is a mental contest; a direct conflict of mind with mind;

and demands not only the exercise of tact and ingenuity, but a knowledge of the human mind, its faculties and workings. It requires skill in the mastery of human nature, and the observation of men in all their characteristics and peculiarities. Above all else a practical experience in the art of dealing with witnesses is essential to a proper cross-examination. For this reason the young lawyer soon discovers his inefficiency in doing this work, and in no other part of his professional labors so much feels the need of assistance. He has learned how to discover and apply the principles of law to given facts; he has acquired some knowledge of where the law is to be found, and how to present it in support of his position; but he has had little or no experience with witnesses, and particularly of that combat which he must have with them in their cross-examination.

It is difficult to tell him what to do—although very much has been written on the subject—and he has not had sufficient experience to know it for himself. Two courses are open to him, and both of them he should follow. One is to attend at trials where leaders of the bar are concerned, and closely study their methods in handling the witnesses ; the other is to read and thoroughly study all he can find upon the subject.<sup>1</sup>

<sup>1</sup> On the subject of cross-examination of witnesses, and under that title, the following writers have thoroughly covered the ground, and what they have said can be read by the lawyer with interest and profit: 2 Elliott's General Practice, Chapter XXV ; Robinson's Forensic Oratory, Chapter X ; Hardwicke's Art of Winning Cases, Chapter IV ; Harris' Hints on Advocacy, Chapters III and V ; Ram on Facts ; Proffat's Jury Trials ; Best on Evidence ; Cox's The Advocate, his Training, Practice, Rights and Duties.

The limit of this work forbids a lengthy discussion of the subject, it being our object, rather, to offer a few suggestions of practical value to the youthful practitioner.

**§ 304. The objects of cross-examination.**—The purposes of a cross-examination are to efface the favorable impressions made by the witness upon the cause for which he has been examined in chief; to remove the convictions of the jury, based upon his evidence; and to turn their confidence in that testimony into distrust or unbelief. To secure these objects the evidence of the witness must be sifted, his credibility attacked, and a test made of his knowledge and memory of the facts, and, in connection therewith, to show his motives and interest in the matter concerning which he has testified. The examiner-in-chief and he who cross-examines stand in opposite positions; the former assumes that his witness knows the facts and states them truthfully and without mistake; the latter proceeds upon the presumption that the witness is untruthful, or has erred through mistake, prejudice or ignorance.

But in this very presumption lies the key to the whole matter. If the advocate believes its grounds do not exist a cross-examination may be most harmful, as it may but serve to strengthen his adversary; while, on the other hand, if he can discover a vulnerable point in the armor of the witness he may strike his spear through that opening into the vitals of his evidence, and thus completely destroy it.

**§ 305. Actual and apparent cross-examination.**—For this reason, cross-examination has been very properly resolved by Judge Elliott into two classes:

one actual, the other, apparent. The one is real, and has for its object the destruction of the testimony of the witness; the other does not go to the strength of that testimony, but is had for the purpose of escaping the dangers of cross-examination, and, at the same time, preventing the jury from concluding that the testimony is too strong to be met with, and is, therefore, admitted to be true if nothing is done to undermine it. While this apparent cross-examination should not be an idle or unnecessary procedure, and must be relevant to the direct examination, its object is to cover the testimony without approaching the danger line of the points where the witness will only strengthen what has been already said.<sup>1</sup>

**§ 306. When cross-examination is not advisable.—** Outside of the apparent cross-examination, had, as we have seen, only to counteract the impression that the witness is so strong that the counsel fears to attack him, and which avoids the strength of his evidence, there are cases where it is wise to avoid any cross-examination. If the witness has not harmed his cause, or has not testified to that which conflicts with his theory, the advocate gains nothing by going over the evidence; while, on the contrary, he may draw out something which may cause serious injury to his own case. Every practitioner knows members of his bar who are prone to the error of over cross-examination, and, when opposed to such a lawyer, usually asks but few questions-in-chief, leaving it to him to bring out the strength of the

<sup>1</sup> 2 Elliott's General Practice, §§ 622, 623; Robinson's Forensic Oratory, § 222.

evidence when the witness has been turned over to him, thereby adding very greatly to the value of the testimony.

**§ 307. Danger of assisting the other side by cross-examination.**—One of the great dangers of cross-examination is in helping out the other side by some incidental circumstances which may confirm or corroborate a statement made by a witness in his direct examination. When the cross-examiner brings out a fact it appears to be much stronger than when given in the direct evidence, for, being an answer to his question, it may be taken as a part of his own evidence. A fact so stated has the appearance of being undesigned, and such testimony is generally the strongest. Mr. Harris sums it up when he says: “Avoid strengthening your opponent’s case by eliciting answers that have more effect upon the jury when they come by way of cross-examination than in chief.<sup>1</sup>

But this rule of avoiding the examination of a witness when the testimony-in-chief has not been harmful has its exceptions. Among them is the important one that if it is believed a favorable statement can thus be secured, or that the witness is friendly, rather than antagonistic, he can be subjected to such a cross-examination as will elicit this advantageous evidence. The danger of the course lies in the probabilities of its success, and the advocate should refrain from it unless he feels well assured that it will result profitably. If the doubt is great it is wise to let the witness go and ascertain

<sup>1</sup> Hints on Advocacy, 42.

privately of the matter, and then recall him as his own witness, if that can be done.

**§ 308. Stupid or timid witnesses should not always be cross-examined.**—Another case when cross-examination is ill-advised is when the witness has failed to assist the adversary in his direct examination, either from stupidity or apparent ignorance, or from timidity; or when the appearance or demeanor of the witness has been such as to discredit him; or his testimony is so improbable as to fall of itself; or, again, when the opposing counsel has so illly conducted his examination as to have failed in bringing out the evidence of the witness. In these instances the witness should be let alone, as cross-examination may do much more harm than good. The witness may be fired by the combat to remember or state facts which he had passed by, and may overcome his stupidity; ignorance or timidity, or he may explain that which he has left doubtful; or may correct the bad impression he had created; or may tell of those things which the opponent has neglected to bring out, or has failed to secure. Mr. Ram, in his excellent work on Facts, sums up the matter very tersely: “In cross-examination, if I were to lay down but one, and that an invariable rule, it would be not to cross-examine at all. In nine cases out of ten, when a witness testifies against you, your cross-examination will only make a bad matter worse.”

**§ 309. The demeanor of the advocate in cross-examining.**—The advocate can not successfully cross-examine a witness unless he himself is in a position likely to accomplish the best results. He must be calm and self-possessed, and should preserve the most

thorough good temper. A calm, imperturbable temperament is essential to self-command, and is one of the lawyer's best qualities. When he loses his temper his good judgment and common sense go with it, for the moment he parts with his self-control he is not a match for a cool witness, or for one whose testimony has so been given as to show his strong mental powers. How often in the court room do we see the lawyer worsted in his combat with a witness who maintains a quiet and dignified manner, while the advocate has lost both these good qualities in the heat of his anger? When a man begins to lose his temper its betrayal is quickly manifested, and rarely is he believed or taken seriously when in that condition.

So must the counsel lay aside his nervousness and put on the whole armor of self-command ; he must be able to think clearly and quickly, and can do so only when he knows what he is about, and has his mind on his witness, and not on himself. Patience is another cardinal virtue in the advocate, particularly at cross-examination ; he must stick to his line, even if he is more than once unsuccessful, and should cling to his attack, even if he has to make it many times, and from different positions.

Above all, he must never show the slightest chagrin or annoyance if he does not succeed in securing that which he is after. Many a time, when he is apparently worsted, a little pleasantry, or a side remark in a jocular vein, may cover his retreat, and thus become an antidote against the poison of the sting. The jury watch him as closely as does the witness, and when his face shows that a point has been made

against him it may be taken by them as evidence of defeat. He may be overcome by the witness, but he should not permit the jurors to know that he is aware of his discomfiture.

**§ 310. The advocate's course while his opponent is examining-in-chief.**—While the direct examination is in progress the opposing counsel should, so far as possible, abstain from interfering with its progress ; he may interject proper objections, but to interfere with the witness himself is a blunder. Too often counsel will tell the witness of his opponent to speak louder, to go more slowly, to turn his face to the jury, or to take down his hand, etc., and will warn him not to say a word when he desires to make an objection. This he will do in a loud and angry manner, as if the witness were his enemy, or had no right to appear in the case. All this is a mistake. It so antagonizes the witness that he will hurt all he can at cross-examination, while it wins the sympathy of the jury, as in such a case the defenseless witness is the under dog in the fight. The true method is to leave him alone, and if he is to be corrected the request should be made to the counsel who examines him, or, if need be, to the court. And, so, of his objections; the advocate should avoid all collision with the witness, so that when he comes to take him in hand he may not be handicapped by his personal enmity or prejudice.

**§ 311. What he should observe during the direct examination.**—During the time the direct examination is proceeding the cross-examiner has three objects of study; the witness, his testimony, and the jury. The latter he watches to note the effect of the

evidence upon them, which may be reflected in their faces or manner; the evidence he weighs to determine its degree of probability, the possibility of contradicting it, and its ultimate effect upon the cause. But, chiefly, must the advocate study the witness himself, in order that he may take his measure and ascertain what manner of man he is; noting his quickness and capacity, and marking his temper and disposition. Thus alone can he know his man and decide both as to the advisability of cross-examining him, and, if he does, what form it shall take, and to what extent it shall go.

**§ 312. How to cross-examine.**—When the witness has been turned over for cross-examination the proper mode is to take him in hand gently, with an expression of good temper, and a certain friendliness of look and manner, endeavoring to conciliate him, and, if possible, to secure his good-will. Too many lawyers jump at a witness as would a tiger upon its prey, indulging in what is known as the “savage style,” for the purpose of terrifying him into telling the truth. There may be rare instances where such a course is of some value, but, as a rule, and with few exceptions, it is a grievous error.

Usually, the witness regards the cross-examiner with enmity, and, expecting to meet him in battle, arms himself for the fray. If he is not disappointed he is likely to get the best of it, because he will do all the harm he can, and, sometimes, in his anger will say much more than he otherwise would. It is a case where courtesy will win much more than brutality. Mr. Hardwicke’s advice is most excellent: “Remember that the witness knows you to be on the

other side; he is prepared to deal with you as an enemy; he anticipates a badgering; he thinks you are going to trip him up, if you can; he has, more or less, girded himself for the strife. It is amusing to mark the instant change in the demeanor of most witnesses when their own counsel has resumed his seat, and the advocate on the other side rises to cross-examine. The position, the countenance, plainly show what is passing in the mind. Either there is fear, or, more often, defiance. If you look fierce and look sternly, it is just what has been expected, and you are met by corresponding acts of self-defense. But if, instead of this, you wear a pleasant smile, speak in a kindly tone, use the language of a friendly questioner, appear to give him credit for a desire to tell the whole truth, you surprise, you disarm him; it is not what he had anticipated, and he answers frankly your questionings.””

**§ 313. Ascertain the motive of the witness.**—The first thing to get at is the motive of the witness. Almost every witness has an incentive, small or great; find what it is and he is at a disadvantage. The chief inducements of witnesses are those arising from kinship, or interest in the cause, or business relationship, or enmity; and these are, usually, the easiest to discover. But there may be a hidden motive, not so readily unearthed, but none the less important to secure. Direct questions will probably be negatived; but the point may be made by indirect interrogatories from which the trail may be struck leading to the desired end. Another method is to

<sup>1</sup> Art of Winning Cases 189.

observe the witness closely during both the direct and cross-examination, by which a change in his tone or manner will be seen when he is speaking from his particular motive, and thus it may be caught.

**§ 314. Cross-examination must have an object.—** There must be an aim and purpose in the cross-examination. Some object is to be secured, but if there is none in the mind of the advocate he is wasting his time and injuring his cause. The purpose of a cross-examination is not so much to establish your own theory—that should come from your witnesses—but to attack that of your opponent, as set forth by his evidence.

You need to test the ability of the witness as to his accuracy concerning that which he saw and heard, and his opportunities therefor ; the truth of his narration of circumstances ; how far his memory is perfect ; and his possible error in identity. This can not always be accomplished by direct questions, but may be secured by indirect questions approaching the subject from standpoints other than those assumed by the witness in the direct examination. What you must do is not to make him run out his bristles by antagonistic questions, but to use conciliatory measures whereby he is thrown off his guard. Seek an inconsistency or an improbability in his evidence ; that found, you may thrust in your sword and twist out the truth. A witness who has honestly erred will often acknowledge his mistake when you have brought it to his attention in a way that does not arouse his hostility ; if he has told a willful untruth, and you can catch him in an inconsistency,

you have him at your mercy, and then you can turn him inside out. The point is to find the vulnerable place, and by an assault through that breach the citadel will fall. Fight him at the outset and he mans all his walls; undermine his fortress by courtesy and you can blow up his castle when you have lodged your powder under the weak places in his battlements.

**§ 315. Avoid letting the witness know that his falsity has been detected.**—But you must not let him see too soon, if at all, that you have detected his falsehood. He may be shrewd enough to cover up or explain his fault, while if his suspicions are not excited he may sink deeper into the mire of falsehood. In the exultation of apparent victory the advocate, and particularly the novitiate, is too apt to let his triumph be seen, and here he may be tripped up, as the witness may have left open an avenue for his escape. Rather lead him into the slough up to his neck and then he can not squirm out. When you have only partially cornered him and find it dangerous to go further, let him go, even if he believes he has won. It is not his opinion you care for, it is the jurors you desire to convince, and when you come to the argument it will be your opportunity to show the conquest you have secured.

**§ 316. Separate inferences from facts.**—It is often of value to separate the facts stated by the witness from the inferences he draws from them. To obtain the inferences flowing from the facts is the province of the jury, and counsel should take care that the witness does not tell more than he actually knows, for often most of that which he tells are but his own

conclusions drawn from what are, perhaps, minor facts; while, by separating them at cross-examination, the evidence given by the witness is much reduced in strength. Here, like in all cross-examination, leading questions are permissible, and by them the testimony may be much diluted.

This mingling of fact and inference has been well described by a famous logician: “The difficulty of inducing witnesses to restrain within any moderate limits the intermixture of their inferences with the narrative of their perceptions is well known to experienced cross-examiners, and still more is this the case when ignorant persons attempt to describe any natural phenomenon. ‘The simplest narrative,’ says Dugald Stewart, ‘of the most illiterate observer involves more or less of hypothesis; nay, in general, it will be found that in proportion to his ignorance the greater is the number of conjectural principles involved.’ ”<sup>1</sup>

**§ 317. Avoid repetition of questions asked in chief.**  
—Do not strengthen your adversary’s cause by asking questions you know will be answered against you; thus, avoid a repetition of those put in the direct examination. As Lord Abinger said: “Never drive out two tacks by trying to drive in a nail.” It is a good rule to obtain the desired information, not by a direct answer, but by a series of questions leading up to it; in this way you may weaken the evidence-in-chief by conclusions drawn by the jury—the safest course to obtain what you want. So, in examining upon a material point, put five unimpor-

<sup>1</sup>John Stuart Mill’s Logic, 546.

tant questions to one important one, and let that one seem to be of less importance than all the others. Slip it in so that the witness may not know its value, and thus you may get the desired answer. When you have what you want do not wait for the witness to correct it, but drop that subject and go to something else.

**§ 318. Do not always cross-examine for explanations.**—As a rule, it is best to avoid cross-examination for explanations; you are thereby likely to strengthen the case of the opposition, and may assist the enemy by obtaining a solution of that which you had much better have allowed to remain a mystery, and which you can use at the argument in showing the improbability of the evidence—the surest mode of attacking any testimony.

Illustrating this, a story is told of a young practitioner who defended an action for assault and battery. The leading witness for the prosecution testified in chief that he saw the affray, but added that he was nearly a block away, and that it had occurred at night. If our young friend had let the witness go he might readily have pointed out in his argument to the jury the inconsistency of the testimony; but, in his enthusiasm, he asked: “How could you have seen the assault when so far away and in the darkness?” The witness calmly answered. “The parties were under a street lamp.”

**§ 319. Treat the honest witness with fairness.**—Be fair with a witness, and, if he is honest, do not seek to entrap him. The cunning witness can be met with cunning, as fire is fought with fire, but it is

neither ethical or just to mislead one who is trying to tell the truth, even if he makes some mistakes. An entrapped witness who has been unfairly caught, and is not untruthful, can be helped out by the opposing counsel, and may win the sympathy of the jury to your disadvantage.

**§ 320. The wisdom of knowing when to stop.**—It is wise to know when to sit down; when to quit a cross-examination. Some lawyers seem never to know how to let go when they have once commenced a cross-examination. They go over minute parts, and question the witness on minor subjects, without plan or object, and then keep it up until every one is tired out. All this is more than useless, for the moment the jury begin to lose attention their interest goes with it, and when that is lost the verdict may have a like fate. The wise advocate will remember that when he has completed his subject of inquiry it is time to stop. Others may go on “fishing expeditions,” but their net, usually containing nothing more than a “water haul,” may have some very large holes difficult to mend.

**§ 321. David Paul Brown’s rules for cross-examination.**—That famous advocate, the late David Paul Brown, of Philadelphia, from whom we have already quoted, has also given rules for cross-examination, which are of equal value with those applying to the evidence-in-chief.

I. “Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate.

“‘Truth, falsehood, hatred, anger, scorn, despair,  
And all the passions—all the soul is there.’

II. “Be not regardless of the *voice* of the witness; next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut streets at a certain time, the question is asked, ‘Were you at the corner of Sixth and Chestnut streets at 6 o’clock?’ A frank witness would answer—perhaps, ‘I was near there.’ But a witness who had been there, desiring to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers, ‘No’; although he may have been within a stone’s throw of the place, or at the very place, within ten minutes of the time. The common answer of such a witness would be: ‘I was not at the *corner*, at *six o’clock*.’

“Emphasis upon words plainly implies a mental evasion or equivocation, and gives rise with a skillful examiner to the question: ‘At what hour were you at the corner’, or, at what place were you at six o’clock?’ And in nine instances out of ten it will appear, that the witness was at the place at that time, or at the time about the place. There is no scope for further illustration—but be watchful, I say, of the voice, and the principle may be easily applied.

III. “Be mild with the mild—shrewd with the crafty—confiding with the honest—merciful to the young, the frail, or the fearful—rough to the ruffian and a thunderbolt to the liar. But in all this, never

be unmindful of your own dignity. Bring to bear all the powers of your mind—not that *you* may shine, but that *virtue* may triumph, and your *cause* may prosper.

IV. “In a *criminal*, especially in a *capital* case, as long as your cause stands well, ask but few questions; and be certain never to ask any the answer to which, if against you, may destroy your client, unless you know the witness *perfectly* well, and know that his answer will be favorable *equally* well, or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations.

V. “An equivocal question is almost as much to be avoided and condemned as an equivocal answer. Singleness of purpose, clearly expressed, is the best trial in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

VI. “If the witness determine to be witty or refractory with you, you had better settle that account with him *first*, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken *your* power, or his own. But in any result be careful that you do not lose your temper; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

VII. “Like a skilled chess-player, in every move fix your mind upon the combinations and relations

of the game—partial and temporary success may otherwise end in total and remediless defeat.

VIII. “Never undervalue your adversary, but stand steadily upon your guard; a random blow may be just as fatal as though it were directed by the most consummate skill; the negligence of one often cures and sometimes renders effective the blunders of another.

IX. “Be respectful to the court and to the jury, kind to your colleague, civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward either.”

## CHAPTER XXX.

### SOME CLASSES OF WITNESSES, AND HOW TO CROSS-EXAMINE THEM.

- § 322. The truthful witness. .
- 323. The untruthful witness.
- 324. How to discern the untruthful witness.
- 325. Ascertain the surrounding circumstances.
- 326. Dislocate the train of ideas of the witness.
- 327. The witness who exaggerates.
- 328. Instances of exaggerations.
- 329. The witness who does not remember.
- 330. The cunning witness.
- 331. The expert witness.

§ 322. **The truthful witness.**—The truthful witness is the most difficult, as well as the easiest to cross-examine. The most difficult, because when truth has been spoken by the witness, many questions, instead of obscuring it, generally bring it out in stronger proportions, and into a clearer light, and the cross-examiner may but help the case of the adversary, as well as injure his own, by seeking to shake the testimony of one who has been sincere.

But while the witness may be honest in what he says, his evidence may not be true, or, at least, not all the truth. He may have stated that which he believes to be veracious, but may not have given all that he knows, and when that has been brought out an entirely different light may be thrown upon his

evidence in chief. Herein, he is the easiest witness to cross-examine, for the reason that his honesty will assist the examiner in getting at the whole matter, for he will not conceal anything, nor equivocate, nor prevaricate.

Where the advocate feels sure that such a witness has related all he knows, and has stated his knowledge from an accurate memory, it is worse than folly to pursue him with a cross-examination; but there may have been subjects omitted from his direct examination which, if supplied, would give an entirely different aspect to the transaction, and none are more ready than is such a witness to set forth these facts when examined upon them. So, also, should his memory and accuracy be tested to determine how far they may be at fault, whereby some modification of his evidence as given in chief may be secured.

**§ 323. The untruthful witness.**—The untruthful witness must be attacked by showing the falsity of his evidence. This may not be possible as to all his testimony, and, hence, it may be necessary to confine the assault to one of the statements, for a single instance of willful falsehood will be sufficient to destroy him. *Falsus in uno, falsus in omnibus*, not only expresses a rule of law, but the natural instinct of all honest men, who will unhesitatingly repudiate a witness when once his voluntary untruthfulness appears.

**§ 324. How to discern the untruthful witness.**—The important point is to distinguish the untruthful witness, and no better means of discovery can be given than those stated by an English author,

who says: "Thus, while simplicity, minuteness and care are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually labored, cautious and indistinct. So, when we find a witness over-zealous on behalf of his party, exaggerating circumstances, answering without waiting to hear the question, forgetting facts wherein he would be open to contradiction, or remembering others which he knows can not be disputed, reluctant in giving adverse testimony, replying evasively or flippantly, pretending not to hear the question to gain time to consider the effect of his answer, affecting indifference, or often vowing before God, and protesting his honesty, we have indications more or less conclusive of insincerity and falsehood. On the other hand, in the testimony of witnesses of truth, there is a calmness and simplicity, a naturalness of manner and unaffected readiness and copiousness of detail, as well in one part of the narrative as another, and an evident disregard of either the facility of vindication or detection."<sup>1</sup>

**§ 325. Ascertain the surrounding circumstances.**—The surest method of discovering the falsity of testimony is to get at the surrounding circumstances, the minor details of the transaction. A story concocted will probably stand the strain upon its main facts, for as to those the witness has prepared himself, but upon remote points, yet connected with the chief subject, he will not be defended. A lying story will not fit in with all its details; the central fact may have the appearance of truth, but when com-

<sup>1</sup> Taylor's Evidence, 69.

pared with its outlying circumstances it may fail from want of harmony with those facts.

Mr. Harris has so clearly and logically stated the matter, that we can not improve his language: "The witness comes up with a well-concocted story, and tells it glibly enough. Now you are well aware that events in this world take place in connection with or in relation to other events. An isolated event is impossible. The story he tells is made up of facts which, if true, fit in with a great many other facts, and could not have happened without causing other facts or influencing them. If his story be untrue, the matters he speaks of will not fit in with surrounding circumstances in all their details, however skillful the arrangement may be. The multitude of surrounding circumstances will all fit in with a true story, because that is part and parcel of those circumstances carved out from them, no matter how extraordinary it may seem; just as the oddest shape stone you could cut out from the quarry would fit in again in the place whence it was taken. It is therefore to the rock, of which it once formed a part, that you must go to see if the block presented be genuine or false. You must, in other words, go to the surrounding circumstances. The witness, however clever he may be, can not prepare himself for questions which he has no conception will be put to him, and if you test his imaginary events by comparing them with real events, you will find the real and the false could not exist in their entirety; there must be a displacement of facts which have actually occurred, which is impossible."<sup>1</sup>"

<sup>1</sup> Hints on Advocacy, 56.

**§ 326. Dislocate the train of ideas of the witness.**—Another mode of attacking the untruthful witness is to dislocate his train of ideas by compelling him to narrate the transaction piecemeal, beginning in the middle of the history, skipping from one portion to another, reversing or confusing its chronological order, and by making one question remote from the subject of the inquiry immediately preceding it. There should be no sequence to the order of the questions, and every effort should be made to confuse the witness in order that his falsity may be detected. To do this properly the questions should be fired at him rapidly, so that he will have no opportunity to invent plausible answers to the inquiries.

**§ 327. The witness who exaggerates.**—The witness who gives a color to his testimony by exaggerated statements, or by those which distort or conceal the facts, is neither truthful, nor yet untruthful. The main fact is true, but the additions which he gives to it, or the circumstances he seeks to hide, render his evidence false, in so far as he thus stretches or suppresses the truth. To secure that which the witness has hidden requires a detailed cross-examination to bring out all the facts within his knowledge, while the detection of a corrupt exaggeration is often accomplished by leading the witness to repeat and enlarge his statements, and then, by a quick turn, suggest a comparison clearly exhibiting the falsity of his evidence. When he has been caught at one point, he is likely to weaken on the others. The most common forms of exaggeration are those concerning values, amounts, distance, speed, etc.; and herein it

is usually easy to bring up the witness with a short turn, if he is given sufficient rope.

**§ 328. Instances of exaggerations.** — Two instances in the personal experience of the writer will illustrate this point. In one, the action was against an electric street car line for damages by a plaintiff who was injured while driving along the track, the allegation being that the great speed of the car had frightened his horse, and caused it to jump in front of the rapidly moving car. In testifying as to the rate of speed, a witness insisted that the car had passed over a certain distance in a given number of seconds. Only a mere calculation was necessary to show that such a rate was equal to a speed of about two hundred miles an hour. The absurdity of the evidence was at once apparent.

In the other case the plaintiff sued to recover the contract price for building a public road. The defendant alleged that the road was not built in accordance with the specifications, and sought to offset the amount which it alleged was necessary to expend in making good those defects, such as improper curbing, drains, culverts, etc. A willing witness for the defendant glibly told of all that was defective, and gave a general estimate of the value of the labor and materials necessary to put the road in the condition called for by the specifications. On cross-examination the witness was asked to give the items in detail, and was led along, step by step, over the whole subject, and required to give each amount separately. The examination was so managed, by keeping the total of each claim somewhat separated from the others, that the witness did not make a

mental addition as he proceeded. When he had finished his testimony an easy destruction awaited him, from the simple fact that his cost of those comparatively small items exceeded the whole contract price for the road, and, if the witness had been correct, the plaintiff would not only have built an expensive road without compensation, but, in addition, would have owed the township a round sum. When this witness was shown the result of his evidence he so weakened that all his testimony went by the board, and, as he was the one upon whom the defendant chiefly relied, a verdict for nearly the whole claim of the plaintiff was speedily rendered by the jury.

**§ 329. The witness who does not remember.**—The witness who is constantly alleging on cross-examination that he does not remember is dangerous, because he will testify positively to the facts upon which he can not be contradicted, but will declare that he can not remember when interrogated upon those subjects where his answers would prove contradictory. Such a witness should be made to repeat that answer as frequently as possible, and to state his want of recollection as positively as it can be secured from him. If from his own testimony it can be made to appear that he is positive where there is no fear of contradiction, and in other matters seeks shelter under the plea of forgetfulness, he can be overthrown at the argument; particularly if those things he professes not to remember are such as, under the circumstances, he should not have forgotten. In the famous trial of Queen Caroline, Lord Brougham did much for his royal client by securing from the Italian witnesses the oft-re-

peated "*Non mi ricordo,*," and by showing their want of recollection of facts as important as those they detailed with such strength against the accused consort of George IV.

**§ 330. The cunning witness.**—There will sometimes come to the stand the cunning, or "smart," witness. He knows it all, and proposes to overcome the counsel who cross-examines him by his own astuteness. Such a witness is a humbug, and the effort should be made to show that fact to the jury. He has a reputation to maintain in his own mind, and when that self-estimation has been lowered he is at a disadvantage. The object should be to trip him up in his own craftiness by making it plain that he is an impostor. This witness should be shown up by a contrast of honesty, whether of appearance, manner, tone or language, with his vulgar self-assertion and mendacious acting. Lead him along his own lines until he will give such an exaggeration as will show at once the improbability of his statement, or disclose his fraud. If you can get him laughed at for his folly or vanity he will be at your mercy, and the jury will either disbelieve him entirely, or greatly discount his evidence.

**§ 331. The expert witness.**—Perhaps the most difficult witness to cross-examine is the expert. He is a specialist in the subject on which he has testified, and is likely to floor the examiner unless he has some knowledge of the matter. Therefore, it is essential that the advocate should have some information upon the questions covered by the testimony of such a witness before he rises to cross-examine. The advocate must assume that the expert witness is

a partisan who is eager and willing to serve the party calling him. He has been defined to be "a man who is paid a retainer to make a sworn argument." Hence, the advocate must avoid giving him an opportunity to repeat that argument.

Unless the lawyer feels that he can shake him he had better examine him upon a few unimportant matters, and then let him go. If, however, it appears that there is a flaw in his armor, it is wise to lead him to an extreme position which he can neither defend nor fortify. But this must be done adroitly, and by an indirect, rather than a straight, course, going off occasionally into a side path, in order that the witness may believe he is going over an entirely different road than the one by which the examiner is really conducting him. When he has reached the danger ground the greatest difficulty arises, for he may then endeavor to retreat or explain, and may escape the hook before the landing net is around him. Here he must be held with a tight line, and be treated firmly, and, if necessary, severely. He must be confined to the subject, and not permitted to stray away from it, for the moment he does he is likely to so becloud the water as to escape as does the cuttlefish which opens its sac and hides from its pursuers in the inky water it has colored.

The expert witness may be cross-examined as to his qualifications, the basis for his opinions, as to whether the authorities do not lay down a different doctrine, and the like; and he may also be asked hypothetical questions, based upon facts within the evidence embodying the cross-examiner's theory of the case.

## CHAPTER XXXI.

### THE RE-EXAMINATION.

- § 332. Duties of the advocate while his witnesses are being cross-examined.
- 333. The purpose of a re-examination.
- 334. Showing the entire transaction.
- 335. New matter developed in the cross-examination, or in the re-examination.
- 336. The course to be pursued in the re-examination.
- 337. When a re-examination is to be omitted.
- 338. How to properly re-examine.
- 339. Explaining away doubts raised by the cross-examination.

**§ 332. Duties of the advocate while his witnesses are being cross-examined.**—The lawyer has two duties to perform while his witnesses are being cross-examined. First, he is to protect them from such assaults of his adversary as tend to prejudice his own cause. When they are unduly pressed he should assist them by such objections and discussions thereon as will enable them to recover themselves, and afford them an opportunity to properly answer the questions. This should be done prudently, so that he may not appear to be concealing anything which should be stated by them, and thus arouse the suspicions of the jury to think that he is endeavoring to prevent the truth from appearing ; hence, this interference should not be had for the mere purpose of saving the feelings of the witness. If the cross-ex-

aminer pursues him with so much abuse as to arouse the sympathies of the jury in his behalf the advocate had much better remain quiet until, at least, the attack becomes so violent as to require him to interfere to avoid the censure of the jury if he fail to defend his witness.

The other duty consists in the advocate's preparing himself for the re-examination. To this end he should closely watch the jury to note any questions or answers which seem to attract their attention, in order to secure the effect they have upon them. Of such matters, as well as of so much of the testimony as seems to require explanation, or tends to discredit the witness, full notes should be made for use at the re-examination.

**§ 333. The purpose of a re-examination.**—The chief objects of a re-examination are to repair the breaches made in the direct testimony, to clear away any obscurities which may have arisen, to reconcile any apparent contradictions, to secure any explanations made necessary by the course of the cross-examination; to restore the confidence of the witness, and to obtain, if possible, a repetition of the more important facts of his evidence in chief. Professor Robinson has thus summarized the objects of the re-examination.

“The field of the re-direct examination is, in each particular instance, measured by the necessities which the preceding cross-examination has created. All its objects of inquiry, however, will fall within the following classes: (1) Facts tending to show that the witness has not erred by misdescription, exaggeration, or extenuation in his direct examina-

tion ; (2) facts tending to show that he has not adduced false inferences as narratives of actions or events ; (3) facts tending to show that he has not himself been mistaken as to the facts which he narrated ; (4) facts tending to confirm the accuracy of his apprehensions, memory, expression, or to remove any suspicions as to his credibility arising from his prejudices or interests or general character ; (5) facts tending to reconcile apparent contradictions in his testimony ; (6) facts tending to explain and corroborate new and favorable facts brought out on the cross-examination. In one or more of these lines of investigation the advocate will find whatever may be profitable to him for healing the wounds inflicted by the cross-examiner, and for turning to his own advantage the facts which were intended for his injury.”<sup>1</sup>

**§ 334. Showing the entire transaction.**—It is the artifice of some examiners, whether in chief or on cross-examination, to bring out from the witness only a part of the subject, particularly that portion which benefits their side, leaving the jury to infer that there is no more of the matter. This is done by examining to a certain point and then turning off to some other portion of the evidence, without giving the witness an opportunity to detail the entire transaction. If not detected in this the artful advocate will not fail to comment in his argument upon the absence of these further and material facts, and thus weaken the force of the evidence. In such cases the other side must not fail to secure from the

<sup>1</sup> Forensic Oratory, § 260.

witness the whole of his knowledge upon the subject, and thus may be able to confound the cunning of his adversary.

On the other hand, the astute examiner-in-chief may purposely lead his witness up to this point, well knowing that the further facts may prove detrimental to the other side, and thus hope to entrap his opponent into bringing it out in cross-examination to his injury. The danger of this course to both parties is apparent. The one leaving it out may not catch his adversary, and may thus be compelled to show the full facts in the re-examination, when it may not benefit him as much as it would have done had he first shown the whole truth, or he may not be permitted to show it at all; while the other party may have his fingers burned if he seeks to uncover that which he had better have left untouched.

**§ 335. New matter developed in the cross-examination, or in the re-examination.**—Cross-examination may bring out new matter very favorable to the side of the examiner-in-chief, and of that he should not fail to take advantage at the re-examination by developing it still more strongly, unless in so doing he may weaken its effect. If he finds himself in that danger he had much better reserve it for the argument, remembering the old adage, “Let well enough alone,” and not forgetting the misfortune of the pitcher which went once too often to the well.

The re-examiner may suffer the misfortune of bringing out new matter at that examination upon which his opponent may so re-cross-examine as to develop such contradictions as will impair, if not wholly destroy, all the testimony of the witness. It

is usually fatal to bring out new subjects at the redirect examination, and, hence, as a rule, the examiner at that time should closely confine his questions to the line followed by his adversary at the cross-examination, and thus prevent a further disintegration of the testimony of the witness. The only safe rule is to bring out the whole evidence of the witness at the direct examination, so that the other side will be thereto confined in the cross-examination, and the examiner-in-chief can have the last word with the witness at the re-examination.

**§ 336. The course to be pursued in the re-examination.**—At no other time in the course of the trial, so much at the close of a cross-examination, does the advocate need to restrain any expressions of irritability or of annoyance, or to refrain from any appearance of discomfiture. His witness has passed through an ordeal which may have left him in a frame of mind far from happy, and needs no further provocation from the one who has examined him in chief. The situation is often most exasperating, and counsel may feel that his case has been seriously damaged by the witness; nevertheless, he must patiently commence to repair the injury, and will be sorely handicapped if he begins by scolding his own witness, either by word or manner.

Mr. Harris well describes the situation of the lawyer at this stage of the case: “Some of your evidence has disappeared altogether; other portions have received such a shock that they exist in a very rickety and dilapidated form; some other parts have received a coating of interpretation, if I may use the expression, which must be removed; other fragments

lie here and there in a mass of confusion from which they must be extricated if you desire to re-establish your case. A hurricane seems to have swept over your homestead, destroying some of your less substantial outbuildings, and threatening even the mansion-house itself. In such a state of affairs as this you will find much to do, and where to begin is the first question.”<sup>1</sup>

**§ 337. When a re-examination is to be omitted.—** When the advocate has received his witness for re-examination he must decide whether or not it is necessary to have it at all, and, if it is, what course it should take. If the witness has not been shaken by cross-examination, or his testimony damaged, it is unwise to continue him on the stand. In short, there should be no re-examination unless there is something to be gained by it. Trifling points may have been made by the cross-examiner, but if the leading facts have been undisturbed the witness should now be dismissed, for fear that further questions may elicit answers damaging to the side for which he has been called. Again, a witness may have been so thoroughly demolished that it would be only making a bad matter worse to endeavor to patch him up. In such a case he had better be allowed to depart with the hope that the injury he has caused may be repaired by the other witnesses.

**§ 338. How to properly re-examine.—** When it is thought best to re-examine, begin where the first breach was made by the adversary, and follow the same order he pursued in his attack. It is of value to repair the damages in the same sequence in which

<sup>1</sup> Hints on Advocacy, 135.

they were inflicted, for thus the jury may be enabled to apply the remedy to the injury. Often, the breach can be so mended that it will be stronger than it was before the assault. You can be sure that your adversary's guns have been turned upon that portion of the breastworks you considered the most secure. You may have failed to see its weakness; he discovered them and may have left the witness, who guarded that part of the fortress, in a sorry plight. Here it is that you may be able to cure his wounds if you have an intimate knowledge of the facts and their relative bearings. If you are the master of the facts, you may apply a cement by your re-examination which will knit together the limbs of your evidence, and put your witness on his feet again.

**§ 339. Explaining away doubts raised by the cross-examination.**—In clearing away the obscurities which have been thrown around the testimony of your witness by the clever cross-examination of your opponent, who has secured that effect by confusing him, begin with the matters regarding which the mind of the witness is not confused, and detain him there long enough to permit him to recover his faculties for the association of facts, and to clear his mental powers by reflection. Put him first on solid ground, and then lead him step by step to a point where he can assist you in removing the mists of obscurity.

Take him over the subject in the order of time in which the events occurred, and feel certain that he is sure of one point before you take him to another. In this way he will be able to state the facts you desire in a clear and orderly manner, and will have re-

solved the doubts raised by your adversary. So, when explanations are needed, as they are when the cross-examination has seemed to entangle the witness by apparently contradictory statements, approach the subject gradually, and, when reached, put it before him in the plainest manner. When his answer indicates that his mind is working intelligently then the precise point can be laid before him, and its elucidation secured. If, however, you find that he remains confused, or will probably be unable to explain, then it is best to let him go, for fear that he may still more entangle the matter in the meshes of the net your opponent has cast around him.

The sum of the matter is that the object of a re-examination is to restore the witness to a confidence in himself, and to regain the belief of the jury in his credibility and truthfulness.

## CHAPTER XXXII.

### IMPEACHMENT OF WITNESSES.

- § 340. Impeachment by destroying credibility, without attacking general character.
- 341. Impeachment by proving contradictory statements.
- 342. Impeachment by attacking the character or general reputation of the witness.
- 343. Laying the grounds for an attack upon character or reputation.
- 344. Cross-examining impeaching witnesses.

**§ 340. Impeachment by destroying credibility without attacking general character.**—A party has the right to lessen or destroy the credibility of a witness called by the adverse party, and this may be done in several ways. Among them is that of attacking his character (which is considered in other sections of this chapter); by questions showing interest, malice or hostility, that his memory is weak, or that he is insane; intoxicated, or not in a proper condition to testify ; and by showing previous contradictory or inconsistent statements. Much, if not all of this, may be shown by the witness himself while under cross-examination, or may be secured by other evidence. This right of impeachment is not confined, but extends to a party in a civil action, or to a defendant in a criminal prosecution who testify in their own behalf ; to all the witnesses called

in the case; and to the impeaching witnesses themselves.

**§ 341. Impeachment by proving contradictory statements.**—When it is proposed to impeach a witness by proof of his statements or acts said or made out of court, and contradictory to, or inconsistent with, his evidence at trial, the proper foundation must be laid. In some courts it has been held that it is not required when a party to the action is himself to be impeached, but in other jurisdictions it has been required in that case, as much as it is when the testimony of any other witness is to be attacked.<sup>1</sup>

Such preliminaries to impeachment of this nature are laid by asking the witness if he did not make a certain statement antagonistic to the testimony now given, to a person named, and at a certain time and place. If the contradictory statement is in writing that instrument should be produced and shown to the witness; the object of laying the foundation being to give the witness an opportunity to explain his alleged contradictions made at another time, or concerning his previous inconsistent acts.

When these preliminaries have been completed it is permissible to offer evidence to show this contradiction or inconsistency, and, if successfully done, may result in destroying the force of the evidence. It is clear that such a course should not be adopted unless the party attacking the witness has, at least, reasonable grounds for believing it will succeed, as a failure is likely to win the sympathy of the jury, and thus materially injure the one who unwarrant-

<sup>1</sup> 2 Elliott's General Practice, § 676, notes 1, 2.

ably assailed the credibility of an apparently innocent witness.

**§ 342. Impeachment by attacking the character or general reputation of the witness.**—There are clients, particularly those of the rural districts, who frequently desire their counsel to impeach the general character or reputation of the adverse witnesses, or of a party to the cause. This is a very dangerous weapon, and may prove to be a two-edged sword in the hands of those who wield it. Such an attack rarely succeeds, and should only be attempted in extreme cases, and when overwhelming evidence can be secured. Few persons willingly swear away the character of their neighbors, and when they do testify on that subject usually do so in a mild and diluted form. In addition, almost every man, however bad he may be, may have some friends who will give evidence in his behalf when he has been thus assailed, and will do so without the appearance of hostility or bias which usually characterizes the attacking witnesses. Again, the jury will hesitate to run counter to their humane instincts by believing the truth of these allegations, especially if they are denied, and to destroy the character of a witness by an adverse verdict chiefly based upon such evidence. Indeed, the greatest risk run by such an attempt is in the probability of arousing the sympathy of the jury by an attack upon the character of a witness, and a case which could be won without such evidence is sometimes lost by its introduction.

**§ 343. Laying the grounds for an attack upon character or reputation.**—A witness can not be called to attack the general character or reputation of a party,

or another witness, until it has been shown that he is a resident of the same place with the one who is to be impeached and is acquainted with his general reputation for truth and veracity among his neighbors. He can not testify as to his own opinion, but, rather, as to that of the general public upon the subject. After showing the knowledge of the witness who is to be impeached, the usual question is this : "Judging from the speech of the people in the community where he resides, what is the general reputation of \_\_\_\_\_ for truth and veracity?" In some jurisdictions, but not in all, he is also permitted to state whether from the knowledge he has of the witness he would, or would not, believe him upon his oath.

**§ 344. Cross-examining impeaching witnesses.—** The cross-examination of those who attack the character or reputation of a party or witness is usually allowed a wide latitude. It is had by a line of inquiry as to whether he lives in, or is familiar with, the neighborhood where the person resides who has been attacked; whom he has heard make derogatory remarks concerning his character or reputation; what is reputation, as he understands it; what opportunities he has had for knowing the reputation of the person; for how long a time it has existed; what has been said, and when and where; whether it is common speech, or but an occasional remark; and whether the impeaching witness has a personal enmity against the one assailed, has been engaged in litigation with him, or has a personal spite against him. The proof of such prejudice may very materially lessen the force of the assault.

Not only may the impeaching witness be thoroughly cross-examined, but the party whose evidence has been sought to be injured by such an attack may call other witnesses to support the character of his witness, and may do so with such success as to turn the tide of battle in his favor.

When it is apprehended that such a course will be adopted against his witnesses it is not only important that their reputation should be maintained, but their testimony on the main issue should be so carefully produced that its circumstances may give such strong probability to it that even an attack upon their character may not destroy it; for even a man of bad reputation may tell the truth, and will generally do so unless he has a motive for testifying falsely.

## CHAPTER XXXIII.

### TAKING THE CASE FROM THE JURY.

- § 345. Determining the defendant's course of action.
- 346. The various means of taking a case from the jury.
- 347. The grounds for a nonsuit, demurrer, etc.
- 348. What is admitted by a motion for a nonsuit.
- 349. When and how the motion is to be made.
- 350. Saving error on motion to take case from jury.
- 351. The defendant's evidence.

**§ 345. Determining the defendant's course of action.**—When the defendant's counsel can determine before the trial the course he will pursue at the close of the plaintiff's case he has the advantage of marking out the line he will then follow, and of making his preparation accordingly. But, as he can not always know in advance what facts will be proven by the plaintiff, he is compelled to reserve his decision upon the course he will take until that evidence is concluded, and then must decide the question with little or no time for deliberation. If his case is strong in fact, and he feels reasonably assured of winning the verdict, he will permit the case to go to the jury, so that he may have the benefit of their findings. Any attempt to take the case away from the jury which is not founded upon a motive, and does not have some foundation in law, or is not made with reasonable hope of success, is most unwise, for

the reason that the jury are apt to imagine that the defendant has a weak case on the facts and does not wish to risk their verdict.

**§ 346. The various means of taking a case from the jury.**—We do not here consider the manner of taking a case from the jury within the control of the plaintiff, by suffering a voluntary nonsuit; nor that which may be done by the court, in its discretion, by withdrawing a juror, when, from surprise, or other cause, the further progress of the trial would be unfair or unjust to either party, but confine our attention to the motion of the defendant to secure the withdrawal of the case from the jury.

The manner in which this may be done, and the name given to the motion, vary in the several states, and are determined by their statutes and practice. Such a motion has one or more of the following names:

1. A compulsory nonsuit.
2. Dismissing the case.
3. Demurring to the evidence.
4. Directing the verdict.

The last motion usually comes at the close of the testimony for both plaintiff and defendant, to which may be added a verdict directed subject to the opinion of the court on questions of law reserved. The others relate, with few exceptions, to a disposal of the case without hearing the defendant's evidence, or without requiring any action from the jury.

While some writers have endeavored to point out material distinctions between a motion for a compulsory nonsuit and a demurrer to the evidence, it can be stated, as a general rule, that the differences

are only in name and in the form of procedure; those which do exist being so much controlled by local practice as to be beyond the province of our investigation. There is, however, in nearly all jurisdictions one material difference in the effect of an adjudication of a motion for a compulsory nonsuit and of a demurrer to the plaintiff's evidence. The latter is a final determination of the question, subject to appeal, but the former, if sustained, enables the plaintiff to commence another action upon the same grounds.

**§ 347. The grounds for a nonsuit, etc.**—A case should be taken from the jury when the evidence, measured by the rules of law, is insufficient to entitle the party to a recovery, or where it utterly fails to establish the cause of action stated in the complaint or declaration. Mr. Tidd has defined a demurrer to the evidence to be “a proceeding by which judges of the court in which the action is depending are called upon to declare what the law is, upon the facts shown in evidence, analogous to the demurrer upon the facts alleged in a pleading.”<sup>1</sup> The general rule for determining the motion of a defendant for a compulsory nonsuit is that it should be sustained if the plaintiff's evidence would not authorize the verdict in his favor, or the court would set it aside if so rendered. The reason is that the court should protect the parties from unjust verdicts, and ought not to occupy the time of the jury, the parties, and the public, with the consideration of a case where a verdict for the plaintiff would be set aside as contrary to law.

<sup>1</sup> Tidd's Practice, 865.

**§ 348. What is admitted by a motion for a nonsuit.**—A motion for a nonsuit, or a demurrer, admits the truth of all the evidence adduced by the plaintiff, as well as all the inferences to be logically and reasonably drawn from the evidence. The ancient rule, that where there is but a scintilla of evidence the case must go to the jury, has been exploded both in England and in nearly all of the states, it being now almost universally held that the true question is, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, and upon whom the burden of proof is imposed.<sup>1</sup>

**§ 349. When and how the motion is to be made.**—Except in cases of a motion to dismiss the cause for insufficiency of the complaint—which can be made at any time before the evidence of the necessary facts alleged to have been omitted has been received—neither a nonsuit, nor a demurrer to the evidence, nor a direction for a verdict, is proper before the plaintiff has closed his case.

The motion therefor must specify the grounds on which it is asked, should be in writing, and made part of the record. After such a motion the door is closed to the plaintiff to introduce further evidence, although, as a rule, it will be opened for that purpose within the discretion of the court, for the reason that if such evidence would cure the error, or supply the omission upon which the nonsuit was granted, it would be sufficient ground to either take off the nonsuit, or to award a new trial, as may be the practice.

<sup>1</sup> Commissioners v. Clark, 94 U. S. 278, 284.

**§ 350. Saving error on motion to take case from jury.**—The granting of a motion for a nonsuit, or sustaining the demurrer, gives the defendant his appeal, because the case is brought to an end. In some courts this must be preceded by a motion to take off, or set aside, the nonsuit, and from that refusal alone the appeal goes up. When it is refused it may be that the practice will not permit error to be alleged as of that stage of the case; because, in some jurisdictions, the defendant will be compelled to produce his evidence, and at the end of the whole case may move for binding instructions for a verdict in his behalf, based upon the ground that under all the evidence the plaintiff can not recover. The reader is referred to other works for a full exposition of the practice in the several states concerning these matters.<sup>1</sup>

**§ 351. The defendant's evidence.**—The defendant's counsel having decided to submit his evidence to the jury, or having been compelled to that course by a refusal of his motion for a nonsuit, or by a denial of his demurrer, and having opened his case (of which something has been said in another place<sup>2</sup>) must now so arrange his evidence that it may have its desired effect. In this it is wise to follow the course of the evidence in the same order in which it was given by the plaintiff, so that the jury may apply it to the points made by that side, and note how they are now met and rebutted. It is also of value to so set out the evidence that it will contrast with that of

<sup>1</sup> Abbott's Trial Brief, pp. 110-117; 2 Elliott's General Practice, § 882.

<sup>2</sup> *Ante*, Chapter XXVII, § 285.

the plaintiff, remembering to so place the facts, if possible, that they will appear to be more natural than were the plaintiff's when compared with the surrounding circumstances.

## CHAPTER XXXIV.

### INSTRUCTIONS TO THE JURY.

- § 352. Requests for instructions.
- 353. Early preparation of requests for instructions.
- 354. Importance of careful preparation of requests.
- 355. When the requests are to be made.
- 356. Exceptions to instructions.

§ 352. **Requests for instructions.**—When the evidence for both sides is in the case is ready for argument. This is usually preceded by the requests for rulings by the court on the law of the case, and to be embodied in its charge among the instructions to the jury. The object of these requests, or points, as they are variously called, is to settle the law of the cause, and they are stated from the stand-point or position of the party offering them. Their use is to aid the party, against whom they are ruled, in making up his case on appeal, by alleging error in the answers of the court thereto, as also to secure such instructions to the jury, on their being affirmatively answered, as will assist the party offering them in gaining the verdict.

Under the statutes of nearly all the states, the trial court is compelled to make answer to these requests by either affirming, refusing or qualifying them ; but, in their absence, the general rule is that no error is committed by the failure of the court to give such

instructions. These requests for instructions are, of right, to be seen or heard by the opposing counsel, in order to give him an opportunity to reply to them, and thereby secure a fair trial ; indeed, no communication in the course of a trial should be received by the judge from either side without its contents being made known to the other.

**§ 353. Early preparation of requests for instructions.**—The requests should always be made in writing, and a copy furnished the opposing party. If possible, these points should be prepared beforehand, when there is time for deliberate thought, and not during the excitement and turmoil of the trial. While some modification of their language may be required after the testimony has been heard, or some may need to be omitted and others added, the advocate will find that the general outline of his requests, as they have been previously prepared, will be of great use to him and will require comparatively few changes.

**§ 354. Importance of careful preparation of requests.**—Making up these requests is professional labor of no mean order, and requires the exercise of skill, and no little labor. They are statements of the law applicable to the case, put in few but terse words, and demand clear and distinct expression, and in language within the comprehension of the jury. The virtues of properly drawn requests are perspicuity of arrangement and clearness of definition. The arrangement is needed to state the matter in logical sequence, while definition is necessary because the propositions must be stated in a few words which must define the law they contain. Not the law, generally, but that which is applicable to the case is re-

quired, and this can not always be safely done by copying the language of judicial deliverance in similar cases ; because, while alike, they may be so different as to remove them from the position of authority on the particular questions involved in the cause. The true way is to state the principle of law, and its application to the facts of the case at bar, in the language of the advocate himself, showing that he is the master of the rules which govern the action.

The instructions should be pertinent to the issue and to the evidence, and must not assume as true facts which are disputed. The question may be raised by prefacing the request with the words "if the jury believe," thus hypothetically assuming the proof to have been made. It is not error, however, to state as true that which has been admitted as conclusively proved, as well as that which has been shown by the testimony of the other side.

**§ 355. When the requests are to be made.**—It is almost universally required that the points shall be submitted to the court before the final arguments are made to the jury, in order that there may be sufficient time to give them due consideration. Nevertheless, counsel are usually permitted, when acting in good faith, to ask for further instructions after the charge is completed, and before the jury have retired, in order to correct an error or supply a deficiency; and some authorities have held it to be fatal error to refuse such a request.<sup>1</sup>

**§ 356. Exceptions to instructions.**—Exceptions to the charge, or to the answers of the court to the re-

<sup>1</sup> Chapman *v.* McCormick, 86 N. Y. 479; Billings *v.* McCoy, 5 Neb. 187; Carey *v.* Chicago, etc., Co., 61 Wis. 71.

quests for instructions, should be made before the jury have rendered their verdict, and it is wiser to make them after the jury have retired, in order that they may not be thereby influenced to believe that the lawyer regards the charge as unfavorable to his cause. They should either be in writing, or noted in the minutes, as may be the practice in the court where they are requested. The form of these exceptions is likewise governed by the practice of the several jurisdictions. It is well to note the many adjudications to the effect that exceptions which are too general have been held to be insufficient, and that, in those instances, they should have been more specific and explicit. Some of the cases on this question seem to almost "split hairs."<sup>1</sup>

<sup>1</sup> 2 Elliott's General Practice, § 907 and notes.

## CHAPTER XXXV.

### ARGUMENT OF THE LAW.

- § 357. Preparation of legal arguments.
- 358. Importance of clearness in statement.
- 359. The nature of the oral argument.
- 360. What is to be avoided in the legal argument.

§ 357. **Preparation of legal arguments.**—So much of a preceding chapter as treats of the preparation of the law of the case is now referred to as covering the proper argument of questions of law, and the arrangement of the brief.<sup>1</sup> Our object here is to add some suggestions relative to the oral argument, particularly when made in the course of the trial of an action. The thorough preparation of such an argument is essential to its proper deliverance. A question of law can not be dealt with by inspiration; it must be discussed logically, and with the exercise of the reasoning powers, and, to that end, requires from the advocate preparatory labor in accordance with its importance. Many famous lawyers have not hesitated to write and re-write their speeches before delivering them, while Erskine, after thus preparing them, practiced before a mirror to secure the effect he intended they should have upon the court or jury.

<sup>1</sup> Chapter XXI.

**§ 358. Importance of clearness in statement.—**The most important parts of an oral argument are the statement of the questions involved and of the propositions of law submitted. Here, clearness is demanded to properly bring the case before the court. Daniel Webster said: “The power of clear statement is the great power at the bar.” What is needed is such precision of statement as will carry conviction by its mere presentation, for a proposition of law clearly stated is more than half argued. John Quincy Adams, in discussing this matter, said: “To the bench, his most powerful instrument of conviction is profound and accurate deduction. To the jury, his most effectual weapon is copious elucidation. His address to the court should be concise, without obscurity; to the jury, copious, without confusion.”

**§ 359. The nature of the oral argument.—**An argument consists of a statement of the nature of the case as it appears from the record, of the facts proven, of the questions of law involved, and an application of the principles and adjudications to those facts. These questions of law should be set forth in language which clearly marks and bounds them, showing what is the point in dispute, what is admitted and what is denied, and where the line of demarkation is between the positions of the parties. Each question should be treated by itself, and should be the central point around which its arguments and illustrations are clustered, all being based upon the principle of law ruling that question, and by that principle all else should be measured and governed.

While eloquence will tend to move the minds of

others, it does not always control the reason, and as the desired end of a legal argument is to secure the favorable ruling of the court upon the law of the case, the powers of the orator are less in demand than those of the logician. What is here wanted is sound sense and accurate expression, coupled with such a logical presentation of the question as carries conviction with it, and secures the judgment of a reasoning mind.

**§ 360. What is to be avoided in the legal argument.**—It is neither necessary or proper to dwell upon elementary principles, as with these the court may be presumed to be familiar. It may be wise to refer to them in a general way, and, perhaps, more at length for the purpose of making a proper application to the facts of the case, but any exhibition of great learning, when unnecessary to a presentation of the legal proposition, is pedantic and quite out of place. For the same reason the argument should be confined to the issues of the case, and not permitted to stray away into side matters. Indeed, the court will sternly bring the counsel back to the question, and may thus put him in an unpleasant position with the jury, who usually watch the legal argument intently, and upon whom what is then said has no little effect.

It is too common a fault to state as a proposition of law that which can not be sustained, and which may be overturned by the language of the decisions the counsel himself may cite, or its falsity easily shown by the argument of the antagonist. It is best to maintain a reputation with the court for veracity and accuracy of statement, for when a po-

sition is then assumed it carries much more weight. Prolixity must be avoided. Let the lawyer say what he has to say tersely, distinctly and accurately, and then sit down. As goes the old adage : “Length of saying makes langour of hearing.” Nor is it wise to suppose that an argument is strengthened by a great number of positions. It is much better to depend upon a few strong propositions than to risk wrecking those by the introduction of many others of much less strength.

## CHAPTER XXXVI.

### THE ADDRESS TO THE JURY.

- § 361. Value of oratory to the lawyer.
- 362. Preparation for the address.
- 363. Value of a brief of the facts.
- 364. The benefits of writing out the address.
- 365. Preparation required to properly arrange the evidence.
- 366. Convince the jury by earnestness.
- 367. Make yourself one of the jury.
- 368. Language to be used in the address.
- 369. Avoid exaggerations.
- 370. Do not flatter the jury.
- 371. The courtesy of the advocate.
- 372. The art of advocacy.
- 373. Illustrations and examples.
- 374. Narration of the circumstances.
- 375. Explanations and comparisons.
- 376. The probability of facts.
- 377. Jurors are won by facts within their experiences.
- 378. Defending facts seemingly improbable.
- 379. Refutation of the antagonist's positions.
- 380. The indirect attack is the best.
- 381. Attacking the evidence of opposing witnesses.
- 382. Attacking the whole case by destroying the evidence of a material witness.
- 383. Overcoming prejudice.
- 384. The address to the jury on behalf of the defendant.
- 385. Where the first attack should be made.
- 386. Pointing the road to a compromise verdict.
- 387. The conclusion of the address.

**§ 361. Value of oratory to the lawyer.**—The art of speaking well is one which the lawyer should highly cultivate. There can never be perfection in oratory, and, hence, there is no end to improvement in that direction. Of all places the advocate most needs the powers of an orator when he comes to address the jury. Some have seen fit to say that fine speeches are no longer the fashion, and that juries are not swayed in these days, as they were in other times, by the oratory of the bar, and that plain words plainly put are the most telling and win the most cases. But herein consists the very art of the orator; to make the case so plain that it carries conviction with it. It is admitted that what was anciently known as oratory—the use of metaphor and of flowery language, all in a high key—are not as forcible as plainer words, but it is not to be denied that many a good cause has been lost by a poor argument, while a weaker one has been gained by its better presentation to the jury. It is the power of speaking well and forcibly that aids the lawyer, and in that he should ever seek proficiency. It is not within the limits of this work to discuss at any length the subject of forensic oratory, upon which books from Quintilian's day to our own have been written, but to add a few suggestions which, it is hoped, may be of some practical value to the beginner at the bar.

**§ 362. Preparation for the address.**—In preparing the address for the jury have it well thought out both in outline and detail. Care must be taken to secure an order and arrangement, so that the jury may the more easily follow and appreciate the argu-

ment, and be able to follow the lawyer along the line of the evidence, and to note the bearing one fact has upon the others. The purpose of the address is to win the verdict; it is not its object to secure the applause or commendation of the audience, but to convince the minds of the jury. The advocate must sink self in the attempt to thus aid his client, and must prepare his speech with that thought single in his mind, and with that aim alone before him.

**§ 363. Value of a brief of the facts.**—It is well to arrange the points to be presented in the form of a brief; this, not only to secure an orderly sequence in the address, but also to prevent the loss of any important matters by a failure of memory during the excitement of the occasion. Again, the young lawyer is sometimes apt to lose his way in the case, and to become confused; here, the brief will bring him back to the path, and enable him to take another start, and in the right direction. A brief should be but an outline to suggest the topics to be discussed, leaving the minor details to be filled in when reached.

**§ 364. The benefit of writing out the address.**—The young lawyer will gain much by writing out his speeches, and by practicing them in advance. It will increase his vocabulary, and aid him in the use of rhetorical language. It will also enable him to make a better plan and system for his address, and assist him in covering the important points of the case. Of this, the famous Rufus Choate wrote: “Always prepare, investigate, compose a speech, pen in hand. Webster always wrote when he could get a chance. Only in this way can a speaker be sure

that he has got to the bottom of his subject, or have the confidence and ease flowing from the certainty that he can not break down. The written matter must be well memorized. I am not to forget that I am, and must be, if I would live, a student of forensic rhetoric. \* \* \* A wide and anxious survey of that art and that science teaches me that careful, constant writing is the parent of ripe speech. It has no other. But that writing must always be rhetorical writing, that is, such as might in some parts of some speech be uttered to a listening audience. It is to be composed as in and for the presence of an audience. So it is to be intelligible, perspicuous, pointed, terse with image, epithet, turn, advancing and impulsive, full of generalizations, maxims, illustrating the sayings of the wise.”<sup>1</sup>

**§ 365. Preparation required to properly arrange the evidence.**—The preparation of an address to the jury is needed to mold the forms in which the materials of the case are to be presented to them. The facts come to the hands of the advocate in crude form, often disconnected, and without apparent relation to each other. It is his duty to fasten them together, to connect one part with another, to explain one fact, apparently antagonistic, by circumstances accounting for its occurrence, and to so shape the case that it will carry conviction to the jury. This work is best done by a careful preparation, and, when time permits, it should never be omitted.

It is well to bear in mind, both in the preparation for the argument, as well as in the delivery of the

<sup>1</sup> Hardwicke’s Art of Winning Cases, 273.

address, that in almost every case there is one salient point, whether it be of law or of fact, by which the case will be controlled or the verdict won. This leading point should be found, and the case made to revolve around it, all the evidence and facts being subordinated to it; while to that prominent factor of the cause the advocate's greatest and best energies are to be directed.

**§ 366. Convince the jury by earnestness.**—First of all let the advocate impress upon the minds of the jury his own sincerity and earnestness, as well as his firm belief in the justice of his client's cause. Half-hearted lawyers can never win. The jury need to be fired with enthusiasm, and can be given that quality by reflexion from the earnest lawyer, but never from him who seems to lack interest in his case. The advocate should yield everything to his cause, letting it have absolute possession of him to the exclusion of all else, and then he is on the high road to success.

**§ 367. Make yourself one of the jury.**—The advocate can do nothing better than to make himself, so far as he can, one of the jury itself. If he will put himself, in imagination, in the place of the jurors, and consider how he would be affected by the arguments, he can prepare his address with much more certainty of success. He should argue the case as if he were one of their number, rather than as one from outside the box. It is not his speech, as such, which will win; it is his presentation of the cause which shows its inherent strength, and thereby convinces the jury. Make the case speak for itself, so that the

jury will put the verdict upon its strength as shown them, rather than upon the mere address.

Juries are loath to admit that it was the address that won them, but, rather, will ascribe the result to the strength of that side of the case. When they say, as sometimes they do, that they could have argued the cause as well as did the lawyer, because it was so plain, it is a proof that the address itself really won them, for it has set forth the strength of the case in a convincing manner. This is the great secret of success in jury trials. Arguments of cases to juries are not for the purpose of making fine declamations, and for using high sounding words; they are intended to convince rather than to please. They are not like the speeches or recitations at the last day of school, delivered in the presence of admiring relatives, but are earnest, sober, logical arguments, intended to carry sufficient force to insure conviction in the minds of the hearers.

**§ 368. Language to be used in the address.**—But this does not mean that the advocate should employ the use of low, coarse or undignified language. On the contrary, the graces of diction are valuable, and the words should be chaste and elegant. Jurors, like all men, are pleased by expressive and beautiful language, while they are not won by a careless, flippancy manner, or by a proper want of dignity in the lawyer. Not that a stilted style is required, for that evinces an affectation on the part of the advocate. Plain words, expressive of the idea, used grammatically and in good style, are far more effective, and may win both the admiration and judgment of the jurors. Xenophon well said; “it is

easier to convince those whom we please," and this is true of the court room. He wins with greatest ease who so argues his case to a jury that they both understand his words and like his style, and note the strength of the case so readily that they themselves believe they could have done as well.

§ 369. **Avoid exaggerations.**—The advocate should avoid any exaggeration of the facts of the cause. It weakens the train of reasoning by putting one part out of harmony with the others; but its chief danger lies in the probable loss of the confidence of the jury; they will not have forgotten the evidence, and a mis-statement may arouse their hostility, and raise doubts in their minds against the justice of a cause which was attempted to be bolstered up by false statements or gross exaggerations. Particularly dangerous is it to adopt such a course in the opening speech, as it will be pointed out by the closing speaker to the serious injury of the other side.

§ 370. **Do not flatter the jury.**—Indulge in no foolish flattery of the jury,—a far too common fault. It is much the wiser plan to convince them by your manner, rather than by your words, of your belief in their honesty and intelligence.

Mr. Harris, in speaking of the folly of "stroking the jury," as he calls it, well says: "There is no necessity to argue with the jury upon their honesty, as though there were some doubt about it; or their impartiality, as if you had a suspicion that they were being influenced by a strong interest on the other side. To put it shortly, you must not let the jury imagine that you are attempting to humbug them. Any observations will be simply foolish that have for

their object the inducing the jury to believe in themselves ; a far better attempt will be to make them believe in you.”<sup>1</sup>

Treat them as men possessing reasoning minds. It is not always necessary to detail all the argument, and thus prevent the exercise of their mental faculties ; it is far wiser to let them see the point by conclusions from your premises, thus making a stronger and more lasting impression on their minds.

**§ 371. The courtesy of the advocate.**—Another fault, happily decreasing, is a want of courtesy on the part of the advocate. Urbanity and suavity are of much greater force than ill-temper and vituperation. The one who exhibits these bad qualities in the treatment of his adversary, or his witness, or counsel, loses the good-will of the jury, and is apt to arouse their sympathy for the person thus attacked, while a lawyer who yields himself to his passions has lost the self-control needed to properly conduct his cause.

**§ 372. The art of advocacy.**—The arts of the advocate are many, and no two employ the same or use them in like manner. And yet it is more than a mere art to win a cause ; it is an exercise of skill and talent in a very high degree. A verdict is secured as the result of hard labor, careful preparation, a knowledge of human nature, the power of stating things well, the gift of arousing attention and the talent of such logical reasoning as carries conviction.

To master men’s minds the advocate should make

<sup>1</sup> Hints on Advocacy, 155.

man his study, and become skilled in the knowledge of human nature. He should know what most affects those to whom he addresses himself, by what means they are convinced, and wherein their thoughts are controlled.

He must have the ability to state facts in an attractive form, to narrate occurrences in a pleasing manner, to tell his story well. It is the art of putting things which controls. One lawyer may do this in a manner that captivates his hearers; another may perform this work so illly as to fail where the other won. To keep alive the interest and curiosity of the jury is all important; to excite anew their attention by a fresh simile, by an original remark, or by a new light thrown upon some unobserved or hidden part of the case, will go far toward winning their minds and securing their verdict.

The advocate must summon to his help tact and sagacity, which consist in knowing how to do things well, and how to apply facts to strengthen his case. It is the art of divination which wins, the power to see what is controlling in the case, and then to so turn upon it the strong light of the argument that the jury will discern its strength for the advocate's cause, and be able to apply it to his advantage. As we have already said, every case is controlled by a few leading features, if not by one. Stick to those and show their influence upon the cause, and do not be diverted by side issues of but little or no consequence.

Things must be made to appear natural, not artificial. They must be shown so that their inherent truth will appear. This can be done by a close and

logical analysis of the facts, eliminating all that are irrelevant, immaterial and improbable, and bringing forth only those which of themselves, or in the light of the surrounding circumstances, can be proven to be true. Mere assertion of a fact is not sufficient; it must be shown by the evidence to have been proven, or that it is a natural inference from other established facts.

**§ 373. Illustrations and examples.**—It would seem almost unnecessary to say that the power of illustration in an argument is an enviable gift ; it is to an address as are the pictures to a book. Faith may come from hearing, but belief is largely controlled by sight. But these illustrations, or examples, should be adapted to the matter of the discourse, not merely highly wrought figures without special application to the subject. They may be homely, and sometimes those are the most telling, but should never be low or vulgar. The art lies in selecting an illustration apropos to the facts under discussion, couched in plain and familiar language, and so stated that from it will follow an argument of force and value.

A famous trial lawyer, the late Judge Linn, was noted for his power of illustration. Trying a case against a railroad company for taking a strip out of his client's farm for its right of way, and noting that his opponent had made a point to the effect that the land was worth but so much an acre, which, multiplied by the number of acres taken, made an amount which he had tendered, and that the jury did not have a clear idea of the injury to the whole farm, by the loss of the smaller portion, and wishing to clear

up the matter, said something like this in the closing address : “ Here, gentlemen, is my coat which cost me twenty dollars ; suppose a statute gave my friend, Mr. P., the right to cut across its front a strip two inches in width, and he should contend that I am entitled to be paid only a price per yard for the cloth he had cut away ; would that be fair, gentlemen ? My coat could still be worn, but would it not be injured as a whole ? Is not my client’s damage of a similar nature ; and should he not have more than the mere worth of the land taken ? ” His adversary told him when he had concluded : “ That coat of yours has cost my client at least a thousand dollars.”

**§ 374. Narration of the circumstances.**—Among the most important parts of the address to the jury is that which narrates the circumstances of the case. Usually, this should be given chronologically, but there are cases when it is wiser to depart from the order of time and bring prominently forward a fact which otherwise might be obscured. This is a much more difficult course than the other, as the natural order is not so well preserved and the jury may not obtain as clear an idea of the matter.

A case is well argued to the jury when it has for its foundation a well-told narrative of the facts, and this statement, to be properly made, should sparkle with oratorical power, and shine with illustrations. Harmony between its various parts is needed, consistency in all portions is demanded, and, over all, it should be made to appear that effect has followed cause, and that the story as told—which, of course,

is from the standpoint of the speaker—is logically true.

**§ 375. Explanations and comparisons.**—One important duty of the advocate is to enlighten the jury by explanations of the hidden or obscured facts in his cause. Facts are scattered all through the evidence and it is the duty of the lawyer to gather them together, and, selecting those of importance, to so lay them before the jury that they may understand their nature and effect. Not only the facts themselves, but the character of the testimony by which they were given, the conformity of the results to experience, and the consequences to which those facts lead, should all be shown. Facts by themselves may not be clear and may need to be strengthened by showing their relation to other circumstances. “The nerve of connection must be shown. The medium of connection is something more than a mere chain of connecting links; it more closely resembles the nerves which connect the organs of a living being than the links of a metal chain, or the strands of the hempen rope. Without this medium of connection, explanations—and narratives, even in a stronger degree—are nerveless and powerless.”<sup>1</sup>

Comparison is an aid to explanation, and things which are themselves plain must be used as the basis of similitude. This comes very closely to illustration, the point being to make that clear which is obscure by comparing it with well-known subjects. When this is done skillfully, and the comparison is in close connection with such a subject, the argument is materially assisted.

<sup>1</sup> 2 Elliott's General Practice, § 721.

**§ 376. The probability of facts.**—The strength of facts is shown in no better way than by pointing out their probability, whereby the minds of the jury will be won to believe them, as they will value probabilities much higher than possibilities. Probabilities are the very strength or weakness of facts, and sometimes will altogether destroy the evidence of facts. A fact stated bearing an improbability is likely to be disbelieved, but has added strength when it appears to have naturally occurred. Probabilities are, therefore, the mainstay of evidence; in short, they are *the* evidence. Cicero well said: “Swearing to opposing facts is unavailing in the face of the strongest probabilities.”

**§ 377. Jurors are won by facts within their experiences.**—Jurors will accept as true statements of facts which correspond with their experiences, and when the advocate has some personal knowledge of the jury, and has the art either of bringing his facts within their actual observation, or, of making new and strange things seem to them like familiar ones, he is on the high road to success.

The main-spring of a probable fact is that it appears natural; hence, it is all important to bring the facts of a cause within the experience of mankind by showing that what has been done was performed as men would have acted under like circumstances; thus the act appears natural and becomes a probable fact and is so accepted. When accounting for an act performed by a client, and it can be made to seem natural, it is wise to ask the jury whether they would not have done the same thing under the same circumstances. This appeal to the experience of the

jurors is often very effective, not only as bringing the facts within the range of naturalness, but, also, as if the advocate was consulting with them as their associate.

Among the means of testing the probability of the evidence of a witness are those of examining the opportunities he had of seeing or knowing that to which he has testified, and the means he had for forming a judgment on a given subject. Tests of memory are of this nature, and will apply to the *non miricordo* class of witnesses, who easily recollect, and clearly too, what is shown for their side of the case, and can not remember any facts likely to contradict them. The improbability of their failure of recollection, when all the facts should have been equally known to them, can thus be made to appear.

**§ 378. Defending facts seemingly improbable.—** When a person whose conduct is being discussed has not acted naturally, some reason should be shown for this departure from usual human conduct. In this, the mental condition of the party, his age, or his situation, as from fear or other cause, may be means for explaining his actions.

Again, acts seemingly unnatural may be made to appear probable by an exhibition of the surrounding or antecedent circumstances. Thus, admissions may have been made by mistake, and acts may have been performed, or words used, which would not have been done or said under other circumstances. Between every event and that which produces it lies the relation of cause and effect. Nothing happens without a cause for its occurrence, and the discovery of that cause may be the key to the explanation of

the main fact. Here it may be necessary to go into details, for little things overlooked may have been the cause of the greater act. The advocate needs the power of close analysis, and thus, by a thorough research into all the surrounding facts and circumstances, small as well as great, he may be able to establish either the probability or improbability of the evidence, and thereby carry conviction by his argument.

**§ 379. Refutation of the antagonist's positions.—** It is unwise to attack all the positions of the adversary. Those which are immaterial and irrelevant should be let alone, as not only wasting time, but because an argument directed to those points may make them seem more important and formidable than they really are. The attack should be made upon the strong positions of the adversary and the forces concentrated upon them. In some cases it is wise to mark them out, taking care that they are not so stated as to add to their strength. Here, analysis is powerful. A dissection of the position may uncover a falsity in a detail overthrowing the whole, which could not be secured if the whole position were assailed together. If one of the outlying defenses can be conquered it may be the entering wedge to capture the whole citadel. This first attack should be successful, for a repulse at the start discourages the assailant himself, and leads the jury to believe that the whole position is impregnable; while one point carried, even if an unimportant one, gives the appearance of victory and inspires confidence.

§ 380. **The indirect attack is the best.**—Usually, the indirect attack is the most successful. If made with a show of force it gives too much importance to the position, and may arouse hostility in the minds of the jury who may have already practically accepted the position as true, thereby causing them to mentally argue the question against the advocate, and thus materially strengthening their belief. The object of the address is not to argue against the jury, but with them.

Lord Abinger put this matter very clearly: “Very often, when the impression of the jury, and sometimes of the judge, has been against me on the conclusion of the defendant’s case, I have had the good fortune to bring them entirely to adopt my conclusions. Whenever I observed this impression, but thought myself entitled to the verdict, I made it a rule to treat the impression as very natural and reasonable, and to acknowledge that there were circumstances which presented great difficulties and doubts, to invite a candid and temperate investigation of all the important topics that belonged to the case, and to express rather a hope, than a confident opinion, that upon a deliberate and calm investigation I should be able to satisfy the court and jury that the plaintiff was entitled to the verdict. I thus avoided all appearance of confidence, and endeavored to place the reasoning on my part in the strongest and clearest view, and to weaken that of my adversary; to show that the facts for the plaintiff could lead naturally but to one conclusion, while those of the defendant might be accounted for on other hypotheses; and when I thought I had gained my point, I

left it to the candor and good sense of the jury to draw their own conclusion. This seems to me not to be the result of any consummate art, but the plain and natural course which common sense would dictate.”<sup>1</sup>

**§ 381. Attacking the evidence of opposing witnesses.**—It is most unwise to attack witnesses with ferocity. Jurors, like all men, will sympathize with those who are assailed without opportunity of defense, and may accept that as true which is forced upon them with vituperation as being false. It is by far the best policy to form a reasonable hypothesis to account for a conflict of testimony, showing that the evidence which is attacked proceeded on mistaken grounds, while what is defended bears evidence of truth when viewed in the light of other or surrounding circumstances. If it can be shown from those circumstances, or from the probabilities, that the witnesses for the adversary were naturally, though honestly, mistaken, the truth of the other evidence can easily be made to appear, and without arousing the sympathy or prejudice of the jurors. These mistakes of the witnesses may have arisen from their want of opportunity for means of knowledge, or from failure of memory; or their evidence may have been but their inferences from the facts, especially when there is a motive shown for their testimony. In all this keen analysis is needed to discover the mistake, for, after all, the power to analyze evidence is the strongest weapon possessed by the trial lawyer.

The effect of the evidence is that with which we

<sup>1</sup> Autobiography of Lord Abinger, 75, 76.

have to deal. If we can show that a fact is consonant or not, as the case may be, with what is admittedly true, we have reached a stage of conviction worthy of success. Thus, if we can point out a discrepancy, or show that a witness has certainly erred in a portion of the testimony, we are in a position to let the jury see the probability of his having been untruthful, or at least mistaken in all he has said.

**§ 382. Attacking the whole case by destroying the evidence of a material witness.**—When a material witness has been discredited the adroit advocate will make effective use of that fact to injure the whole case of his opponent. One bad witness taints a whole case, and when it can be shown by a quiet suggestion, made without abuse, that he is the central figure of the adversary's evidence, it may darken his whole cause. But this must be done with skill, because a violent attack might arouse hostility, as we have before suggested. The point is to associate all the witnesses around the one who has been discredited, and thus secure additional benefit from his downfall.

Herein will the opposing counsel adopt precisely the opposite method. He will show that such a witness is not necessary to his cause, and will disassociate him from the others. If he must rely upon his testimony he will gather around his evidence all the corroborating circumstances and testimony, and endeavor to support it from extraneous sources. He will show absence of evil motive, and want of interest, and thus endeavor to negative every presumption of falsehood. His position will be that while the general character of the witness may have been as-

sailed, there is no reason why he may not have told the truth in this case, and will strive to establish the probability of his evidence as now given.

§ 383. **Overcoming prejudice.**—One of the chief arguments against the jury system is that verdicts are frequently governed by prejudice and sympathy, rather than controlled by the evidence. When this is feared it must be overcome by the advocate, so far as he can, by an appeal to their sense of justice and by setting forth the wrong done by a verdict rendered without regard to the truth. He must not do this so as to arouse the distrust or antagonism of the jury, but rather by a quiet suggestion that he feels sure of justice at their hands. Sometimes he can drive away prejudice by showing the jury the consequences of their verdict upon matters of general or public interest, and, within certain bounds, such a course is justifiable.

The writer has in mind an action of ejectment upon a tax title, where the defendant's counsel appealed to the sympathies of the jury, by urging upon them the alleged injustice of robbing his client of a valuable piece of land for his delinquency in paying taxes, and giving it to the plaintiff for the insignificant sum paid by him at the treasurer's sale. The real facts were that the defendant was a man of means, although miserly, and had sought to escape taxation. The plaintiff had also offered at one time to convey him the land for its cost to him, and was refused his generous offer in language of vituperative abuse, whereupon, under the local practice, the defendant had ruled him to bring the action of ejectment. In closing the case to the jury the counsel for the plaintiff

overcame the prejudice of the jury, and won the verdict, by showing them the necessity for the enforcement of the laws providing for the collection of taxes, in order that the business of the county could be carried on, and pointed out that the taxes in the case at bar could only have been collected by the sale of the lot in controversy, and that the consequence of allowing the defendant to have the verdict would be to give license to him, and to others like minded, to escape payment of taxes, and to thus throw the burden upon the other citizens of the community.

**§ 384. The address to the jury on behalf of the defendant.**—Much, if not all, that we have said touching the address to the jury will apply to the defendant's as well as to the plaintiff's argument; but a few suggestions can be added particularly applicable to the address of the defendant's counsel. Supposing the burden of proof to be upon the plaintiff, as it usually is, he has the closing speech, and the defendant must make his address with the recollection that the plaintiff is to reply; hence, it should be somewhat anticipatory of that answer, and a rebuttal of what is then to be said. The counsel for the defendant, if he has thoroughly prepared the plaintiff's case, as he always needs to do, will know its strong points and can assist his side by telling the jury of them and answering them in his own way. The additional advantage is that it often takes off the keen edge of those positions, and prevents them from having the same force they would have when presented by the plaintiff. Particularly is this true of a position which has not thus far been made to openly ap-

pear in the case, and the plaintiff desires to add to its strength the novelty of its freshness.

**§ 385. Where the first attack should be made.—** The first question the defendant's counsel has to decide is where to begin his attack. It should be against the strong points of the plaintiff, pointing out their inconsistencies and improbabilities, reserving the weak points for his second and strongest assault. The burden of proof being in his favor, if he can show that, assuming all the plaintiff's facts to be true, they do not necessarily prove the case, he is on an almost certain road to victory. As has been well said: “What you have to look for in the plaintiff's case are false points, false arguments, absurd reasons for reasonable conduct, exaggerations, perversions of simple facts, unnatural theories, improbable motives and contradictions.”<sup>1</sup> If these, or any of them, can be clearly pointed out by the defendant's counsel he can found an argument in his client's behalf seriously damaging the plaintiff's case.

**§ 386. Pointing the road to a compromise verdict.** —It is well to remember that, notwithstanding the burden of proof is thrown upon plaintiffs, the verdicts are more frequently against defendants. There are ways of explaining this, and one may be, possibly, that the jury believe that the plaintiff would not have commenced his action without just cause, and another may be that his counsel has the closing address, and his voice may be ringing in their ears while that of the defendant's counsel may, from its distance, have lost its enchantment. Therefore, it

<sup>1</sup> Harris' Illustrations in Advocacy, 70.

is well for the defendant's counsel to bear in mind that jurors, like all from whom a decision is required, are apt to seek a compromise, and, if he does not feel certain of a verdict, he should let them see, by a gentle hint, such a loop-hole for his escape.

**§ 387. The conclusion of the address.**—If there is to be any oratory in the case now is the time to bring it forth. The peroration is intended to produce upon the hearers a final impression highly favorable to the claims of the orator. It needs to be couched in language attractive, impressive and polished, and should not be, as Mr. Harris says, "like the end of a squib, all bang, nor the finish of a rocket, all stars above every one's head."

The peroration has two forms, either or both of which may be assumed at the close of the address. The one, is a summing up and concise restatement of the whole matter; the other, a direct appeal to the emotions. The summing up is needed when the address has been long, and many matters are involved. It must not be a repetition, and above all needs to be short. Brevity and precision are the qualities most needed in a peroration.

Finally, be brief; remembering that the moment the jury begin to weary their interest flags, and all that is said after that time is worse than lost. When the jurors begin to be weary and to show signs of distress it is time to stop, unless, indeed, the speaker can then bring forth the powers of an orator sufficiently great to arouse their interest. What many lawyers need to learn in addressing the jury is when to sit down. Whole chapters could be written upon the virtues of those two words, and their importance should ever be borne in mind by the advocate.

## CHAPTER XXXVII.

### DUTIES AFTER VERDICT—NEW TRIALS—APPEALS.

- § 388. The charge of the court.
- 389. The verdict.
- 390. Duties after verdict.
- 391. Motion for a new trial.
- 392. Appeals.
- 393. Let courage ever be your motto.

§ 388. **The charge of the court.**—The charge to the jury may sound the death-knell of your case, it may presage your victory, or it may leave the questions to be entirely determined by the jury. Whatever it may be, favorable or not, take care to have an exception noted in your behalf. This exception must be in the form required by the practice, and, unless forbidden by that practice, should be requested out of the hearing of the jury, to prevent any prejudice being created in their minds by their belief that the charge may have been considered unfavorable to your side. For the same reason no sign of disapproval should be visible in your face or conduct, no matter how much against you may be the charge of the court.

§ 389. **The verdict.**—Nothing more severely tries the nerves of the advocate, particularly when he is a youthful practitioner, than the few moments intervening between the return of the jury and the rendition of their verdict. His feelings and interest have

been wrought up to a high degree, and at no time are they so intense as at the moment when he is to learn whether he is to win or lose his case. It is worth while to note the faces of counsel as the jury give in their verdict; wonderfully cool and self-possessed is the lawyer who then shows no external evidence of his feelings.

The verdict rendered, and against you, it is your right, as well as your duty if you suspect it has not been reached with unanimity, to request that the jury be polled. The question put to each juror should simply be: "Is this your verdict?" Any one of them has a right to dissent, whether the verdict is oral or sealed, at any time before it is recorded and they are discharged. When such a dissent has been noted the jury is usually sent back for further deliberation, but they may be discharged and a new trial ordered.

**§ 390. Duties after verdict.**—If you win the verdict your duties to follow will be to prepare and enter your bill of costs, and to observe all statutory requirements to obtain a judgment on your verdict, if not prevented by a motion in arrest of judgment, for a new trial, etc., and to proceed to collection if no appeal is taken in time to become a *supersedeas*.

If the verdict is against you, your duties, outside of an application for a new trial, considered in the succeeding section, may be included within these motions:

1. For a bill of exceptions, of which the object is to make matter of record what would not otherwise appear as such. This application must be made

at the time, and in the manner and form required by the practice of the jurisdiction where the case is tried.<sup>1</sup>

2. To award a *venire facias de novo*, which accomplishes the same result as a motion for a new trial, but proceeds upon the ground of defects appearing upon the face of the record, such as an imperfection in the verdict or finding, or a wrongful disallowance of a challenge to a juror.

3. For a repleader, which is awarded on the form or manner of the pleadings, and not upon the merits; and is used when it appears that the verdict has been obtained on an immaterial issue. It was a motion known in the older practice, but is now rarely used.

4. To give judgment *non obstante veredicto*, which is usually asked for by the plaintiff where the answer confesses his cause of action and sets up matter in avoidance, which, although found by the jury to be true, is alleged to be insufficient in law to constitute a bar or defense to the action. In other jurisdictions, *e. g.* Pennsylvania, it is made where a question of law has been reserved for further consideration, with leave to enter judgment for the other party notwithstanding the verdict.

5. To dismiss for want of jurisdiction. This is a motion made in the federal courts, under an act of congress of March 3, 1875, whereby the circuit court may entertain a motion to dismiss the case for want of jurisdiction, even if made after verdict.

§ 391. **Motion for a new trial.**—When the verdict is against you it is the better practice to apply for a

<sup>1</sup> For a full discussion of the subject see 2 Elliott's General Practice, Chapter XL.

new trial before taking an appeal to the court of last resort. This is not only courteous to the trial judge, in order to give him an opportunity to review his rulings upon questions of law, of necessity determined with but little opportunity for a careful examination, owing to the hurry of the trial, but, also, because in some jurisdictions questions may be raised, particularly those appealing to the discretion of the court, which can not be assigned as error on appeal.

The usual grounds for an application for arrest of judgment and for a new trial are included within the following reasons ; although some of them may not be considered in all jurisdictions :

1. New evidence, discovered since the trial, without negligence in the party making the application.
2. That the verdict is against the law, the charge of the court, or the weight of the evidence.
3. That the court erred. (*a*) In impaneling the jury. (*b*) In ruling on offers of evidence. (*c*) In its answers to the points or requests submitted. (*d*) Or in its general charge to the jury.
4. That the damages are excessive.
5. Surprise on the part of the losing party.
6. Misconduct of the judge, jury, or opposing counsel, or party.
7. Unavoidable absence, or sudden illness, of a material witness.
8. That one of the jury is nearly related to the successful party, interested in the case, or the like ; such facts being unknown to the applicant for the rule, or his counsel, at the impaneling of the jury, or during the trial of the cause.

To substantiate some of these grounds depositions

may be necessary; for others, the record will be sufficient. The application must be made within the time limited by the statutory provisions or the rules of the court, and must set forth in writing, and with reasonable certainty, the grounds upon which it is based.

**§ 392. Appeals.**—If it becomes necessary to take the case to an appellate court, carefully follow all the statutory provisions and observe all the rules of that court. Let your brief be a model of terseness and succinctness, not covering every minor question, or raising numerous assignments of error, but devoted to the salient points of the controversy, with a citation of such authorities as bear upon the issue so raised, by direct application, or by analogy. Here, of all places, present a clean-cut, concise argument, remembering that, by reason of the usually crowded lists in the appellate courts, your oral argument must be very short, and devoted to the main points, leaving your printed brief to fill in the flesh and blood of your skeleton argument at the hearing.

**§ 393. Let courage ever be your motto.**—“Finally, my brethren, be courageous,” and let not defeat dishearten nor discourage you, but rather search diligently for some avenue of escape, by a new trial or appeal. Be like some lawyers who never know when they are beaten, and often, “from the thorn of defeat pluck the rose of victory.” An illustration of such courage is within the knowledge of the writer, and is worthy of being preserved.

The employes in one of the yards of a railroad company were shunting cars into switches, without a brakeman accompanying each loosened car; one

of the cars striking and killing a stranger who was crossing the track. His widow (whom we will designate as the "Lawyers' Widow," because, possibly, she was under a conditional contract with them) brought suit and, after a lively contest, recovered a large verdict. The company filed general reasons for a new trial, and, pending the respite thus gained, issued what might be called a *scire facias* upon the history of the decedent. They enlarged their reasons for a new trial and proved that the decedent had been wedded before his marriage with the plaintiff, and that that relict (whom we will designate as the "Railroad Widow," because she had given the company a release for a nominal consideration) was alive and alone entitled to the action. The new trial was granted, as a matter of course, and the defendant's counsel felt sure of success, until it was shown on behalf of the plaintiff that her husband had contracted a still earlier marriage, and that the first wife (whom we will call the "Dead Widow") had gone to that bourne from whence no traveler returns—by railroad, or otherwise. It was further proven that this first wife was living at the time of the decedent's marriage with the Railroad Widow, but had died before he had wedded the plaintiff, who was, therefore, the lawful widow of this much married decedent, and alone entitled to recover.



## APPENDIX I.

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### *COPY OF AN OLD AND CURIOUS DEED.*

THIS INDENTURE, Made the ninth day of October, in the year of our Lord one thousand seven hundred and ninety-three, between Clara Helena Ellinkhuysen, of the town of Louisburg in the Township of Buffaloe, in the County of Northumberland, and Commonwealth of Pennsylvania, widow, of the one part, and Flavel Roan of the town of Sunbury, in the County and Commonwealth aforesaid, Esquire, of the other part. Whereas, the Creator of the earth, by parole and livery of seizin, did enfeoff the parents of mankind, to wit, Adam and Eve, of all that certain tract of land, called and known in the planetary system by the name of The Earth, together with all and singular the advantages, woods, waters, water-courses, easements, liberties, privileges, and all others the appurtenances whatsoever thereunto belonging, or in any wise appertaining, to have and to hold to them the said Adam and Eve, and the heirs of their bodies lawfully to be begotten, in fee-tail general for ever, as by the said feoffment recorded by Moses, in the first chapter of the first book of his records, commonly called Genesis, more fully and at large appears on reference being thereunto had: And, Whereas, the said Adam and Eve died seized of the premises aforesaid in fee-tail general, leaving issue, heirs of their bodies, to wit, sons and daughters, who entered into the same premises and became thereof seized as tenants in common by virtue of the donation aforesaid, and multiplied their seed upon the earth: And, Whereas, in process of time, the heirs of the said Adam and Eve having become very numerous, and finding it to be inconvenient to remain in common as aforesaid, bethought themselves to make partition of the lands and tenements aforesaid to and amongst themselves, and they did accordingly make such partition: And, Whereas, by virtue of the said partition made by the heirs of said Adam and Eve, all that certain tract of land called and known on the general

plan of the said Earth by the name of America, parcel of the said large tract, was allotted and set over unto certain of the heirs aforesaid, to them and to their heirs general in fee-simple who entered into the same and became thereof seized as aforesaid in their demesne as of fee, and peopled the same allotted lands in severalty and made partition thereof to and amongst their descendants: And, Whereas, afterwards (now deemed in time immemorial), a certain united people called "The Six Nations of North America," heirs and descendants of the said grantees of America, became seized, and for a long time whereof the memory of man runneth not to the contrary, have been seized in their demesne as of fee, of and in a certain tract of country and land in the north division of America, called and known at present on the general plan of the said north division by the name of Pennsylvania: And, Whereas, the said united nations, being so thereof seized, afterwards, to wit, in the year of our Lord one thousand seven hundred and sixty-eight, by their certain deed of feoffment with livery of seizin, did grant, bargain, sell, release, enfeoff, alien, and confirm unto Thomas Penn and Richard Penn, otherwise called The Proprietaries of Pennsylvania (among other things), the country called Buffaloe Valley, situate on the south side of the west branch of the River Susquehanna, parcel of said country called Pennsylvania, to hold to them the said proprietaries, their heirs and assigns for ever, in their demesne as of fee, as by the same feoffment more fully appears: which last-mentioned tract of country was, afterwards, with other tracts of country, by the said proprietaries by the advice and consent of their great council in general assembly met, erected into a county called Northumberland aforesaid, of which the said Buffaloe Valley was and is parcel by the name of Buffaloe Township aforesaid: And, Whereas, the said proprietaries, by their letters patent, bearing date the eleventh day of August, in the year of our Lord one thousand seven hundred and seventy-two, did grant and confirm unto a certain Richard Peters in fee simple a certain parcel of the said township, called Prescott, situate at the mouth of Spring Run, adjoining and below the mouth of Buffaloe Creek, on the south side of the west branch of Susquehanna aforesaid in the township and county aforesaid, by metes and bounds in the said letters set forth, containing three hundred and twenty acres, and allowance, &c., as by the same letters patent enrolled at Philadelphia in Patent Book A. A., vol. 13, page 265, more fully and at large appears: And, Whereas, the said Richard Peters, by

his certain indenture bearing date the seventeenth day of November, in the year of our Lord one thousand seven hundred and seventy-three, did grant, bargain, and sell the last mentioned tract and parcel of land containing three hundred and twenty acres and allowance with the appurtenances, unto a certain Ludwig Derr in fee simple, as by the same deed recorded in the office for recording of deeds in and for the County of Philadelphia, in Deed-book No. 22, page 444, appears at large on reference thereto had: And, Whereas, the said Ludwig Derr, being so seized thereof, did lay out a town called and known by the name of *Louisburg*, consisting of three hundred and fifty lots or parcels of land, with suitable and proper streets, lanes, and alleys, containing about one hundred and twenty-eight acres, parcel of the said tract last hereinbefore mentioned, as by the general plan of the said town appears: And, Whereas, the said Ludwig Derr afterwards died intestate (having previously disposed of divers of the said lots to divers persons), leaving a widow (who is since deceased) and issue, his only child George, his heir at law: By virtue and reason whereof the lands, tenements, and hereditaments aforesaid whereof the said Ludwig was seized at the time of his death, and which he had not aliened, descended to and became vested in the said George Derr in fee simple, who entered into the same and became seized in his demesne as of fee: And, Whereas, the said George Derr being so thereof seized, by his certain indenture, bearing date the twentieth day of December, in the year of our Lord one thousand seven hundred and eighty-eight, did grant, bargain, and sell all his estate and interest in the town aforesaid with the appurtenances, unto a certain Peter Borger in fee simple, as by the same deed recorded in the office for recording of deeds in Philadelphia, in Deed-book No. 22, page 442, and at Sunbury in Northumberland County aforesaid in Deed-book D, page 397, appears: And, Whereas, the said Peter Borger, and Florinda his wife, by their certain indenture bearing date the second day of January, in the year of our Lord one thousand seven hundred and eighty-nine, did grant, bargain, sell and confirm the town, lots, lands, tenements, and premises whereof they were so seized, unto a certain Carel Ellinkhuysen, of the city of Rotterdam in the Province of Holland, in the United Netherlands of Europe, merchant, in fee simple, as by the same deed recorded in the office for recording of deeds in and for the County of Northumberland, in book E, page 231, &c., appears: and whereas the said Carel Ellinkhuysen, being seized of the premises aforesaid by virtue thereof, by his certain deed in writing

called a letter of attorney, sealed and delivered, bearing date the 8th day of May in the year of our Lord 1789, did constitute, appoint, and authorize the said Peter Borger (among other acts and things) to sell, dispose of, and convey and assure to such persons as should agree for the same, all such lots of land in the said town as the said Peter Borger should deem expedient, as by the said letter of attorney recorded at Philadelphia in letter of attorney-book No. 3, page 84, reference being thereto had appears: and whereas the said Carel Ellinkhuysen (by his said attorney, Peter Borger, constituted as aforesaid, unrevoked) by a certain indenture bearing date the 25th day of June, in the year of our Lord 1790, did grant, bargain, and sell unto Matthias Joseph Ellinkhuysen, late husband of the said Clara Helena Ellinkhuysen, and to the said Clara Helena, wife of the said Matthias Joseph, all that certain lot or piece of land (among other things) parcel of the said town, not disposed of by the said Ludwig Derr, situate in the said town of Lquisburg, and known on the general plan of the said town by the number 51, to wit, fifty-one, containing in breadth on Front Street and on Walnut Alley sixty-six feet, and in depth on St. Louis Street and lot No. 52, one hundred and fifty-seven feet and six inches, bounded on the south by Front Street aforesaid, on the west by St. Louis Street aforesaid, on the north by the said Walnut Alley, and on the east by lot No. 52 aforesaid, to hold to them the said Matthias Joseph Ellinkhuysen and Clara Helena his wife, their heirs and assigns for ever: by virtue whereof the said Matthias Joseph Ellinkhuysen and Clara Helena his wife became seized in their demesne as of fee of the lot of ground aforesaid, with the appurtenances, in joint-tenancy, to wit, to them and to the survivor of them, his or her heirs and assigns for ever, as by the said deed, recorded in the office for recording of deeds in and for Northumberland County, in book E, page 84, reference being thereunto had, more fully and at large appears: and whereas afterwards the said Matthias Joseph Ellinkhuysen died seized as aforesaid of the premises aforesaid, leaving the said Clara Helena his wife, by reason whereof the said Clara Helena Ellinkhuysen become sole seized of the same premises in her own right and demesne as of fee: Now, this indenture witnesseth, that the said Clara Helena Ellinkhuysen, for and in consideration of the sum of sixteen pounds and ten shillings, lawful money of Pennsylvania, to her in hand well and truly paid by the said Flavel Roan at the execution hereof, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released

and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, and confirm unto the said Flavel Roan, his heirs and assigns, all that the aforesaid described lot of ground, together with the appurtenances, rights, easements, liberties, privileges, and hereditaments whatsoever thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, to have and to hold the aforesaid described lot or piece of ground numbered as aforesaid 51, hereby granted, or meant, mentioned, or intended so to be, with the appurtenances, unto the said Flavel Roan, his heirs and assigns, to the only proper use, benefit, and behoof of him the said Flavel Roan, his heirs and assigns for ever. In witness whereof, the said parties to these presents have hereunto set their hands and seals interchangeably the day and year first above written.

CLARA HELENA ELLINKHUYSEN, { I. S. }

Sealed, and delivered }  
in the presence of }

JNO. HAYES.

JNO. THORNBURGH.

(Recorded in the office of the Recorder of Deeds, etc., in and for the County of Northumberland at Sunbury, Pennsylvania, November 3, 1793, in Deed Book F, page 280 *et seq.*



## APPENDIX II.

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